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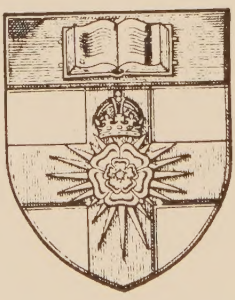

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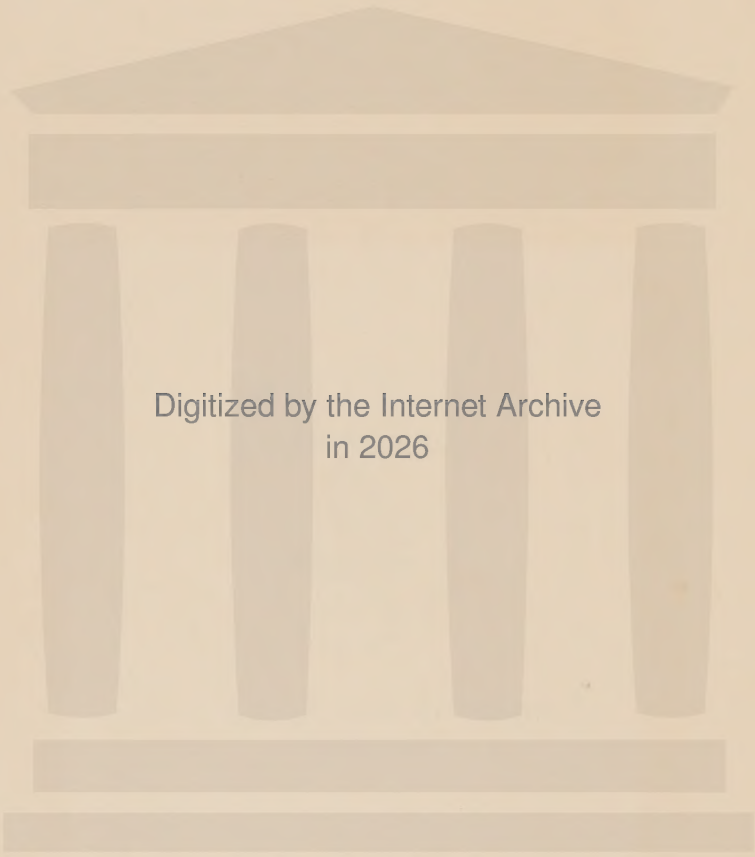

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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

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Feb. 6, 7, 8; *March* 1.

NESBITT AND OTHERS *v.* MABLETHORPE URBAN DISTRICT COUNCIL.

[1916 N. 195.]

Seashore—Sandhills adjoining Shore—Ownership of—Sandhills under "view, cognizance, or management" of Commissioners of Sewers—Sewers Act, 1833 (3 *&* 4 *Will.* 4, *c.* 22), *ss.* 10, 47.

By s. 47 of the Sewers Act, 1833, "the property of and in all lands, tenements, hereditaments, buildings, erections, works, and other things which shall have been or shall hereafter be purchased, obtained, erected, constructed, and made by or by the order of, or which are or shall be within or under the view, cognizance, or management of any Commissioners of Sewers, with the several conveniences and appurtenances thereunto respectively belonging . . . . shall be and the same are hereby vested in the Commissioners of Sewers . . . ."

Sandhills formed by the forces of nature above high-water mark, adjoining the shore at Mablethorpe, which served as a protection

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against the inroads of the sea, were subject to the jurisdiction of the Commissioners of Sewers, who, from time to time, repaired the same and on which they refused to allow the erection of any permanent structure without their licence. The Commissioners, however, made no claim to the ownership of the sandhills except in places where they had erected toolsheds and where they had executed works of a permanent character. The plaintiffs, as the owners of adjoining inlands, claimed to be the owners of the sandhills. The conveyance to them of the adjoining inlands made no mention of the sandhills, but they had exercised certain acts of ownership thereon :—

Held—(1.) that although the sandhills were under the "view, cognizance, or management" of the Commissioners of Sewers within the meaning of that expression in s. 47 of the Sewers Act, 1833, that section did not vest the property in the sandhills in the Commissioners ; (2.) that the grant to the plaintiffs of the adjoining inlands did not pass the property in the sandhills ; but (3.) that the plaintiffs had acquired a title by possession to the sandhills by exercising acts of ownership thereon, notwithstanding the fact that the Commissioners of Sewers had refused to allow them or their lessees to erect permanent structures thereon without licence.

Stracey v. *Nelson* (1844) 12 M. & W. 535 followed.

West Norfolk Farmers' Manure Co. v. *Archdale* (1886) 16 Q. B. D. 754 distinguished.

Decision of Bailhache J. [1917] 2 K. B. 568 on the above points affirmed. (1)

APPEAL from the judgment of Bailhache J. in an action tried without a jury ; reported [1917] 2 K. B. 568.

The facts are fully stated in the judgments of Bailhache J. and of the Court of Appeal, and it is only necessary to state them shortly as follows :—

The action was brought to recover the amount of an award made by an umpire under the Lands Clauses Act, 1845, in respect of certain sandhills in the defendants' district. The sandhills adjoined the shore at Mablethorpe, and were formed by the forces of nature above high-water mark. They served as a protection against the sea, and were subject to the jurisdiction of the Commissioners of Sewers, constituted under 23 Hen. 8, c. 5. The Commissioners repaired the sandhills from time to time, and built toolsheds on them, and refused to allow the erection thereon of any permanent structure without their licence. They never claimed any owner-

(1) The judgment was, however, reversed on the point dealt with at p. 580 of the report below.

ship in the sandhills, except in places where they had built sheds or executed works of a permanent character. In 1914 the defendants obtained an Act which vested the sandhills in them, subject to the rights of the Commissioners; and compensation was to be paid to any person owning or having any interest in the sandhills. The plaintiffs, as the owners of the adjoining inlands, claimed to be the owners of the sandhills. The conveyance to them of the adjoining inlands made no mention of sandhills, but they had exercised acts of ownership thereon. The plaintiffs claimed compensation in respect of a stretch of sandhills about 600 or 700 yards in length. They held the inlands under two titles—one title covered the whole length except 77 yards, and the other covered the 77 yards. The umpire awarded the plaintiffs 679*l*. In an action on the award the defence was, first, that the plaintiffs had no title to any of the sandhills; and, secondly, that they had not established their title to the sandhills adjoining the 77 yards, and that as the umpire had awarded one sum in respect of all the lands the award could not be enforced.

Bailhache J. held that s. 47 of the Sewers Act, 1833, did not vest the property in the sandhills in the Commissioners; that the grant to the plaintiffs of the adjoining land did not pass the property in the sandhills; but that the plaintiffs had acquired title by possession to the sandhills, except as to the 77 yards, by exercising acts of ownership thereon. He, however, held that the plaintiffs had not established their title to the 77 yards strip of sandhills, and as the sum awarded was one sum for the whole he could not apportion it, and the action failed.

The plaintiffs appealed, and the defendants served cross-notice of appeal.

Upon a subsequent application by the plaintiffs Bailhache J. refused, the umpire having died since the award was made, to remit the award for reconsideration to the two arbitrators or to two other arbitrators. The plaintiffs appealed also against the refusal to remit.

Upon the appeal the plaintiffs raised the point that the umpire had only awarded compensation in respect of the sandhills other than the 77 yards strip, and the Court, as will be seen from the judgments, adopted this construction of the award

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Compston, *K.C.*, and *Lawton*, for the plaintiffs. The learned judge was right in holding that s. 47 of the Sewers Act, 1833, did not vest the property in the sandhills in the Commissioners of Sewers: *Stracey* v. *Nelson*. (1) Sect. 10 only gave the Commissioners jurisdiction over the sandhills for the purpose of maintaining them as defences against the sea. Sect. 39 gave them power to sell lands vested in them. Before the Act it was held in *Duke of Newcastle* v. *Clark* (2) that Commissioners of Sewers had not such a possession in their works as to enable them to maintain an action of trespass. In Callis on Sewers, p. 74, a bank of the sea is compared to a highway, "for that the property thereof is to him whose ground is next adjoining." The learned judge was, however, wrong in holding that the plaintiffs' claim to the sandhills adjoining the 77 yards strip failed. The plaintiffs, having a conveyance in fee simple from Gray, have made out a prima facie title to the inlands, and that title has not been displaced by the defendants. As owners of the inlands the plaintiffs have by their acts of ownership for more than twelve years over the adjoining sandhills acquired title thereto. Even if Gray paid 10*s*. a year to the dykereeve, it is uncertain in respect of what land it was paid, or whether he paid it as rent. Mere payment of the 10*s*. a year is not sufficient to make Gray a tenant: *Batten Pooll* v. *Kennedy*. (3) The dykereeve, to whom it was paid, is the servant of the Commissioners: Sewers Act, 1849 (12 & 13 Vict. c. 50), s. 3. The plaintiffs did not know of the payment; and moreover, even if they are to be treated merely as tenants, by their acts of ownership they acquired the sandhills for themselves, and the presumption that the sandhills were acquired as part of their holding, and therefore for the benefit of the landlord, is rebutted. [Upon the question of remitting the award *Lord* v. *Hawkins* (4) was referred to; and on the question of summoning a jury under s. 23 of the Lands Clauses Act, 1845, to assess compensation if arbitration proceedings proved abortive, *Ex parte Senior* (5) and *Lind* v. *Isle of Wight Ferry Co.* (6) were referred to.]

T. R. Hughes, *K.C.*, and *Jeeves*, for the defendants. Sect. 47 of

(1) 12 M. & W. 535.
(2) (1818) 8 Taunt. 602.
(3) [1907] 1 Ch. 256.
(4) (1857) 2 H. & N. 55.
(5) (1849) 7 Dow. & L. 36.
(6) (1862) 7 L. T. 416.

the Sewers Act, 1833, vests land "under the view, cognizance, or management" of the Commissioners in them. Sect. 10 gives them jurisdiction over the land, and when they have exercised jurisdiction over the land, as they have done in the present case, the land is vested in them: *West Norfolk Farmers' Manure Co.* v. *Archdale* (1), a decision of the Court of Appeal which is inconsistent with *Stracey* v. *Nelson.* (2) This latter case ought not to be followed. The observations of Wood V.-C. in *Crossman* v. *Bristol and South Wales Union Ry. Co.* (3) are also inconsistent with it. By the acts described by Bailhache J. (4) the Commissioners have "taken to" the sandhills within the decision in *West Norfolk Farmers' Manure Co.* v. *Archdale* (1), and the property therein is vested in them. Sect. 47 upon its plain construction vests the property in the Commissioners. [*Hinde* v. *Chorlton* (5), *Wadmore* v. *Dear* (6), *Winch* v. *Thames Conservators* (7), and *Coverdale* v. *Charlton* (8) were also referred to.]

Next, with regard to the sandhills adjoining the 77 yards strip, Gray, under whom the plaintiffs claim, is only tenant of the strip, as he pays 10*s.* a year rent for it. Gray cannot dispute the title of the person to whom he pays it: *Doe* v. *Baytup* (9); *Clark* v. *Adie.* (10) The conveyance from Gray did not purport to include the sandhills, and so they did not pass: *Mellor* v. *Walmesley.* (11) Land cannot pass as appurtenant to land: *Lister* v. *Pickford.* (12) Even if Gray or those claiming under him acquired a title to the sandhills by virtue of the Statute of Limitations by acts of ownership thereon, they presumably acquired it as part of the adjoining inlands of which they were tenants, and therefore for the benefit of the landlord, whoever he might be: *Andrews* v. *Hailes* (13); *Earl of Lisburne* v. *Davies* (14); and there is nothing in this case to rebut that presumption. They only acquired the sandhills as tenants of the adjoining strip.

The compensation having been assessed in one sum in respect

(1) 16 Q. B. D. 754.
(2) 12 M. & W. 535.
(3) (1863) 1 H. & M. 531.
(4) [1917] 2 K. B. 569.
(5) (1866) L. R. 2 C. P. 104, 116.
(6) (1871) L. R. 7 C. P. 212, 223.
(7) (1872) L. R. 7 C. P. 458, 468.
(8) (1878) 4 Q. B. D. 104, 124.
(9) (1835) 3 Ad. & E. 188.
(10) (1877) 2 App. Cas. 423, 435.
(11) [1905] 2 Ch. 164.
(12) (1865) 34 Beav. 576.
(13) (1853) 2 E. & B. 349.
(14) (1866) L. R. 1 C. P. 259.

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of the whole claim, the award cannot be severed and is bad: *Beckett* v. *Midland Ry. Co.* (1) *Healey* v. *Thames Valley Ry. Co.* (2) shows how strictly the Lands Clauses Act, 1845, is in this respect to be construed. The umpire being dead, the award cannot be amended, and the learned judge was right in refusing to remit it. [*In re Keighley, Maxsted & Co. and Durant & Co.* (3); *In re Palmer & Co. and Hosken & Co.* (4); *In re Montgomery, Jones & Co. and Liebenthal & Co.* (5) were also cited.]

Compston, K.C., in reply.

Cur. adv. vult.

March 1. PICKFORD L.J. read the following judgment:—The plaintiffs in this case sued the defendants for an amount due to them on an award made by an umpire in an arbitration under the Lands Clauses Acts, which was held to assess the compensation due to the plaintiffs in respect of land in the district of the defendants. The defendants' substantial defences are two: 1. That the plaintiffs have no title to any of the lands; 2. That they have no title to a portion of the lands, and that the umpire has awarded one sum in respect of all the lands, and, therefore, the award is bad. If the plaintiffs have no title to a portion of the lands, and if the sum awarded is in respect of all, it is not contended by the plaintiffs that they can recover the amount. Bailhache J. has decided that this is the case and given judgment for the defendants. The plaintiffs then applied to the same learned judge to remit the award for reconsideration. The umpire, who made the award, had died before the trial of the action, and it could not, therefore, be remitted to him, but the plaintiffs asked that it should be remitted either to the two arbitrators originally appointed or to two arbitrators and an umpire to be then appointed by the judge. Bailhache J. refused the application, and the plaintiffs appealed both against the judgment for the defendants in the action and the refusal of the application. The defendants have given notice questioning the learned judge's finding that the plaintiffs had established a title to a part of the lands, and asking that the judg-

(1) (1866) L. R. 1 C. P. 241.
(2) (1864) 5 B. & S. 769.
(3) [1893] 1 Q. B. 405.
(4) [1898] 1 Q. B. 131.
(5) (1898) 78 L. T. 406.

ment should be affirmed on one or more of the grounds on which the judge, in giving judgment, found against the defendants.

The land in respect of which the compensation was awarded is that part of a range of sandhills which adjoins some land called the inlands, which was conveyed to the plaintiffs and their predecessors in title. Part of the defendants' objection to the plaintiffs' title applies to the whole of the sandhills claimed by them, and part applies only to the portion adjoining a strip of inland 77 yards in length, which I shall deal with in greater detail later. The sandhills claimed by the plaintiffs form part of a long range of sand-dunes or hills of natural formation, which serve as a protection against the inroads of the sea and are above high-water mark of ordinary tides. The whole range is subject to the jurisdiction of Commissioners of Sewers constituted under an Act 23 Hen. 8, c. 5. The Commissioners, if necessary, repair the sandhills from time to time, and have built toolsheds on them. They also prevent any acts detrimental to the safety of the sandhills, and do not allow any erections upon them without their consent. They grant licences for such erections, the terms of which require the person building the erections to remove them when so required by the Commissioners. They have never claimed any ownership in any part of the sandhills except where they have built sheds or done permanent work.

In 1914 the defendants obtained an Act (Mablethorpe Urban District Council Act, 1914, 4 & 5 Geo. 5, c. xxi.), which vested the sandhills in them. The preamble recites that the Commissioners of Sewers have certain statutory jurisdiction, powers, and rights over the sandhills for the purpose of sea defence and land drainage, that interests or rights (other than those of the Commissioners) are claimed in or over the sandhills by the owners of enclosed lands opposite or adjoining thereto, subject to such rights of user of the sandhills as the public shall have acquired, and that it is desirable that the sandhills, subject to the jurisdiction, powers, and rights of the Commissioners, should be vested in the council freed and discharged from all other interests and rights. In respect of these interests compensation was to be paid so far as they should exist. The Act then vests the sandhills in the defendants, and contains provisions for compensation, and the preservation of the rights

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of the Commissioners. No question arises in this case as to any rights of the public.

I shall have to refer to the Act in detail later, but this general statement of facts is sufficient for the purpose of dealing with the first point raised by the defendants. This applies to all the sandhills, including the part claimed by the plaintiffs, and rests on the contention that all the sandhills were vested in the Commissioners of Sewers by the Sewers Act, 1833 (3 & 4 Will. 4, c. 22), ss. 10 and 47. These sections are as follows:—

Sect. 10: "And whereas doubts have arisen as to the extent of the jurisdiction of Commissioners of Sewers; be it therefore further enacted and declared, that all walls, banks, culverts, and other defences whatsoever, whether natural or artificial, situate or being by the coasts of the sea, and all rivers, streams, sewers, and watercourses which now are or hereafter shall or may be navigable, or in which the tide now does or hereafter shall or may ebb and flow, or which now do or hereafter shall or may directly or indirectly communicate with any such navigable or tide river, stream, or sewer, and all walls, banks, culverts, bridges, dams, floodgates, and other works erected or to be erected in, upon, over, or adjoining to any such rivers, streams, sewers, or watercourses, shall be from henceforth, to all intents, constructions, and purposes, within and subject to the jurisdiction of Commissioners of Sewers: Provided always, that nothing herein contained shall authorize or empower any Commissioners of Sewers to exercise authority or jurisdiction upon or over any dams, floodgates, or other works erected for the purpose of ornament, previous to the passing of this Act, in, upon, or over any rivers, streams, ditches, gutters, sewers, or watercourses near or contiguous to any house or building, or in any garden, yard, paddock, park, planted walk, or avenue to a house, without the consent in writing of the owner or proprietor thereof respectively first had and obtained." Sect. 47: "And be it further enacted, that the property of and in all lands, tenements, hereditaments, buildings, erections, works, and other things which shall have been or shall hereafter be purchased, obtained, erected, constructed, and made by or by the order of, or which are or shall be within or under the view, cognizance, or management of any Commissioners of Sewers, with the several conveniences

and appurtenances thereunto respectively belonging, and also all and singular the goods, tools, utensils, materials, and things whatsoever had and to be had, bought, procured, or provided by or by the order of, or which are or shall be within or under the view, cognizance, or management of such Commissioners, shall be and the same are hereby vested in the Commissioners of Sewers within or under whose view, cognizance, or management such lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials, and things shall respectively be, who are hereby empowered to bring or cause to be brought any action or actions, or to prefer or order the preferring of any bill or bills of indictment, against any person who shall dig up, break or pull down, damage, destroy, injure, spoil, steal, take or carry away, or wilfully and wrongfully buy or receive, any such lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials, and things whatsoever as aforesaid, or any part thereof; and in every such action and indictment the said lands, tenements, hereditaments, buildings, erections, works, goods, tools, utensils, materials, and things shall be laid or described to be the property of the said Commissioners, without stating or specifying the name or names of all or any of such Commissioners."

If s. 47 be read literally, it would seem to vest the sandhills in the Commissioners and so support the defendants' contention. It was, however, decided by the Court of Exchequer in *Stracey* v. *Nelson* (1) that the section has not that effect, and that it does not vest in the Commissioners the property in the sandhills or in all lands under their view, cognizance, or management. The Court consisted of Lord Abinger C.B., and Parke, Alderson and Gurney BB. Detailed reasons for the judgment were given only by the Chief Baron and Parke B., and their reasons were not founded on the same considerations. They are set out in the judgment of Bailhache J., and I do not think it necessary to repeat them. Alderson and Gurney BB. concurred in the judgment, but did not state on which considerations they relied. This judgment has never been reversed, and has more than once been referred to as an existing authority: see *Hinde* v. *Chorlton* (2), *Winch* v. *Thames*

(1) 12 M. & W. 535. (2) L. R. 2 C. P. 104, 116.

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Conservators (1), and *Coverdale* v. *Charlton* (2); but it was said to have been virtually overruled by *West Norfolk Farmers' Manure Co.* v. *Archdale.* (3) The actual decision in that case does not conflict with *Stracey* v. *Nelson* (4), but there are expressions in the judgments of Lord Esher M.R., Lindley and Lopes L.JJ. which in some particulars seem inconsistent with it, if they are detached from the subject-matter with which the Court was then dealing. The question there arose upon the effect of s. 10 of the Sewers Act, 1833, and dealt with an artificial bank made by somebody, and s. 47, although mentioned in the argument and judgments, was not really under the consideration of the Court. An artificial bank which might, as Bailhache J. says, be presumed to have been made by some earlier Commissioners and was under the view, cognizance, and management of the then Commissioners, might very well vest in them under the judgment of Parke B. Moreover, *Stracey* v. *Nelson* (4), in which the effect of s. 47 was before the Court directly, and not only indirectly as in *West Norfolk Farmers' Manure Co.* v. *Archdale* (3), was not cited. We were also referred to *Crossman* v. *Bristol and South Wales Union Ry. Co.* (5) (not cited to Bailhache J.), before Lord Hatherley when Vice-Chancellor, as conflicting with *Stracey* v. *Nelson.* (4) I do not think that it is any authority against it. Here again *Stracey* v. *Nelson* (4) was not cited, and the decision, which was upon the question of granting an interim injunction, only established that the Commissioners had shown such an interest as entitled them to maintain the action. Lord Hatherley, in giving judgment, said that it was quite possible they had only such a property as was contended for by the junior counsel for the defendants, i.e., sufficient to entitle them to protect their interests as Commissioners. This would seem to be the kind of vesting which has since been held to exist in highway authorities: see *Coverdale* v. *Charlton* (6), and would not divest the general property in the sandhills from the former owners of them. I do not think either of these cases can be said to have established that *Stracey* v. *Nelson* (4) was wrongly decided. It is pointed out by Bailhache J. that since

(1) L. R. 7 C. P. 458, 468.
(2) 4 Q. B. D. 104, 124.
(3) 16 Q. B. D. 754.
(4) 12 M. & W. 535.
(5) 1 H. & M. 531.
(6) 4 Q. B. D. 104.

the decision of that case more than seventy years ago another Land Drainage Act (24 & 25 Vict. c. 133) was passed in 1861, which established new bodies of Commissioners of Sewers and gave them power to acquire lands. The law as laid down in *Stracey* v. *Nelson* (1) was well known then and could have been corrected if deemed wrong. It was not so corrected, and the legislation must be taken to have been passed in view of the law established by it. The Commissioners so far as these sandhills are concerned have always acted upon it. As I have already pointed out, they never have claimed, and so far as I know do not now claim, any property in the sandhills except so far as they have erected permanent works upon them.

Again, the Act under which the defendants have acquired the sandhills proceeds, as Bailhache J. says, upon the assumption that the property is not vested in the Commissioners. It recognizes that there may be rights other than theirs, and then proceeds by s. 7, sub-s. 3, to protect the rights of the Commissioners in these terms: "Nothing in this Act contained shall be deemed or construed to extend to prejudice, diminish, alter, abridge, or take away any of the jurisdictions, rights, powers, or authorities vested in the Commissioners, and except as in this section is otherwise provided all such jurisdictions, rights, powers, and authorities shall be as good, valid, and effectual to all intents and purposes as if this Act had not been passed." This provision is inconsistent with the property being in the Commissioners. It could not be still preserved while the sandhills were by the same Act vested in the defendants. I agree with Bailhache J. that we ought not, even if we thought it incorrect, to overrule a decision which has stood so long, in view of which further legislation, seeming to recognize it, has taken place, and upon which many transactions involving rights of property must have taken place. The first point taken by the defendants therefore fails.

It is clear, however, that this decision does not determine the real question in this case, i.e., whether the plaintiffs have shown that they have a title to the sandhills claimed, and in order to come to a conclusion on this point it is necessary to examine the facts more in detail. Different considerations apply to the plaintiffs' claim in respect of the larger part of the sandhills claimed

(1) 12 M. & W. 535.

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by them and to that adjoining the strip of inland on the north of their property, in length about 77 yards. I propose to deal with the larger part first.

The conveyance to the plaintiffs does not mention the sandhills, and the parcels are defined in such a way as, in my opinion, to exclude them from the operation of the conveyance. It is, I think, clear from *Mellor* v. *Walmesley* (1) that in such a case the sandhills, although possibly at some distant date formed by accretion, do not pass by the conveyance. Some evidence was given that in this district it was generally understood that the sandhills were the property of the owners of the adjoining inlands. If such an understanding exists, it is immaterial and cannot affect the true construction of the conveyance. The fact, however, if it be a fact, that the owner of the adjoining inlands considers the sandhills to belong to him may induce him to exercise acts of ownership over them, which, if continued for a sufficient length of time, may give him a title by possession, and this is the only bearing which it has upon the case. In respect of this part of the sandhills, therefore, the only question seems to me to be whether the plaintiffs have acquired a title by possession. They did exercise rights only explicable as acts of ownership which are detailed in the judgment of Bailhache J., and which I need not repeat, extending for considerably more than twelve years before the passing of the defendants' Act of 1914, and thereby acquired a title by possession to this portion of the sandhills, and I think the finding in their favour on this part of the case was right.

The claim in respect of the part adjoining the 77 yards of inland to the north must be examined a little more closely. This formed part of a long strip of land lying on the east side of what is called the cut, a watercourse made a long time ago mainly for the purpose of draining the parish or district of Theddlethorpe adjoining the defendants' district of Mablethorpe on the north. At the time this cut was made there was an old cut nearer to the sandhills, which was filled in, and the long strip, of which the 77 yards formed part, consisted of the land between the two cuts and probably also in part of the site of the old filled-in cut. In 1886 Mr. William Gray, who was either the owner, or, as will be explained later,

(1) [1905] 2 Ch. 164.

the tenant of this 77 yards and the continuation of it to the north, conveyed the 77 yards strip in fee simple to a Mr. Ranshaw. Mr. Ranshaw was an artillery volunteer, and acquired the strip in order to use the adjoining sandhills for a practice range for his battery. On February 1, 1886, he demised his rights to a part of the sandhills adjoining the strip he had purchased to the colonel commanding the Artillery Volunteer Corps for the use of this battery, reserving a rent of 1*l.* a year which was paid to him in respect of this plot so demised. The lease is cautiously worded, and may perhaps suggest that Mr. Ranshaw was not quite certain as to his title to the sandhills, but the letting of part of them was an undoubted act of ownership. This lease was for fourteen years. On February 11, 1901, Mr. Ranshaw demised the same plot in the same words to the major of another battery for the purposes of a practice range for that battery. This demise was for seven years at a rent of 2*l.* a year. On April 4, 1901, Mr. Ranshaw conveyed to Mr. C. M. Nesbitt the strip of 77 yards in fee simple. A concrete foundation or gun emplacement had been constructed on the plot demised, and so far as is known is still there, although probably now covered with sand, as the plot ceased several years ago to be used for the purposes of the battery. The rent reserved by the lease was paid to Mr. C. M. Nesbitt after the conveyance to him of the 77 yards strip until 1903, when the battery ceased to use the plot. In my opinion neither the conveyance by Gray to Ranshaw nor the conveyance by Ranshaw to Nesbitt conveyed the sandhills, as the parcels are so defined as to exclude them, and if Ranshaw acquired a possessory title he did not transfer it by conveyance to Nesbitt. I think his intention was to pass his title to Nesbitt, as is shown by his allowing the rent for the battery to be paid to him. I do not, however, rest my decision on that, as I think Nesbitt acquired a possessory title himself after 1901, subject to the point to be afterwards mentioned. The receipt of rent by Nesbitt was certainly an act of ownership, and no one else ever exercised any ownership or received any rent in respect of this part of the sandhills. The acts of ownership are from the nature of the ground slight, but I think that the evidence shows that both on this and other parts of the sandhills adjoining these inlands Nesbitt and the plaintiffs exercised rights of ownership whenever

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occasion arose, that no objection was ever made to them, and no acts claiming such rights were ever exercised or any such rights claimed by other persons. The fact that licences were obtained from the Commissioners in all cases of erections on the sandhills does not affect the acts of ownership by Ranshaw, Nesbitt, and the plaintiffs. These licences were required only for the protection of the sandhills, and the evidence is distinct that the Commissioners did not regard them as acts of ownership or claim by them any title to the sandhills.

Mr. C. M. Nesbitt died in 1903 and the plaintiffs are the trustees of his estate. The objection raised to a possessory title in the plaintiffs, so far as this part of the sandhills is concerned, is that Mr. W. Gray, who conveyed the strip to Mr. Ranshaw, and his predecessors in title had paid for many years a rent of 10*s.* to the dykereeve of Theddlethorpe, which is called rent in the receipts given to them and in the dykereeve's accounts. The 10*s.* was paid by the dykereeve to the Commissioners of Sewers and credited in their accounts as a payment by Theddlethorpe. I think the evidence shows that the 10*s.* was paid in respect of the whole strip occupied by Gray, including the 77 yards. There is no explanation of the origin of the payment. Mr. Gray, the son of the Mr. Gray who conveyed the strip, said he did not know why it was paid, and the clerk to the Commissioners gave similar evidence. The dykereeve, though nominated by the parish of Theddlethorpe, is an official of the Commissioners. The explanation may be that as the cut was made mainly for the benefit of Theddlethorpe and at the expense of that parish they considered the strip was theirs and charged a rent for it, but this is only conjecture. Some evidence was given by a former dykereeve that he had been told by his father, also formerly a dykereeve, that the strip was bought by the parish of Theddlethorpe and handed over to the Commissioners. I doubt if this was admissible in evidence, but at any rate I consider it of no weight. It was no more than gossip, and no record of any such transaction was produced either from the records of the Commissioners or those of the parish of Theddlethorpe. Upon these facts the defendants contended that no possessory title could be acquired by either Mr. Ranshaw or the plaintiffs, as Gray was only a tenant of the dykereeve representing either the parish of Theddlethorpe or the Com-

missioners, and could not convey any greater title to the strip of 77 yards than he had himself. It was also contended that as Ranshaw, Nesbitt, and the plaintiffs could only acquire a title to the strip as tenants, and as Gray still continued to pay the 10*s.*, any acts of ownership by them over the sandhills adjoining must be taken to have been done in their capacity as tenants, and that therefore they could acquire no title themselves to the sandhills. In support of this contention the cases of *Andrews* v. *Hailes* (1) and *Earl of Lisburne* v. *Davies* (2) were cited.

I do not agree with this contention. I am not at all clear that it is established that the payment by Gray, although called rent, arose from a tenancy, but for the purposes of this judgment I will deal with it as though it were. The cases show that it is always a question of fact whether the person claiming a possessory title has acquired it by virtue of his tenancy so that the benefit enures to the landlord, or whether he acquires it for himself. I think the presumption is, prima facie, that it enures to the landlord. This, however, may be rebutted, and I think it is rebutted in this case. Neither Mr. Ranshaw nor Mr. C. M. Nesbitt knew anything of the payment of 10*s.*, nor did the plaintiffs, and Gray did not pay it as their agent. Mr. Ranshaw and Mr. C. M. Nesbitt both took a conveyance in fee simple, and I think both of them considered themselves absolute owners of the strip, and I see no reason to doubt that Mr. Gray thought he had the right to convey. They may all have been wrong, but all that they did was done under that impression with the intention of acting as absolute owners and exercising their rights as such owners, and I think that under those circumstances they acquired the title to the sandhills for themselves and not for the persons, whoever they might be, who represented the lessors to Mr. Gray or his predecessors. On this point, therefore, I cannot agree with the decision of Bailhache J., and think that the plaintiffs have made out their title to the sandhills adjoining the strip of 77 yards as well as to the other part.

This is sufficient to dispose of the case, because, assuming that the award includes compensation in respect of all the sandhills mentioned, I think the plaintiffs have proved their title to them. But assuming my judgment as to the larger part of the land claimed to

(1) 2 E. & B. 349. (2) L. R. 1 C. P. 259.

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be correct, I think that the plaintiffs are entitled to succeed on another ground, i.e., that the umpire has not awarded any compensation in respect of that part adjoining the strip of 77 yards. This point was not taken before Bailhache J., where it was assumed that the award included compensation in respect of all the land claimed. During the argument I inclined strongly to the opinion that the point was not open to the plaintiffs, because, if taken in the Court below, it might have been met by evidence not before us. After consideration I have come to the conclusion that this opinion was incorrect. In consequence of the death of the umpire I do not think any further relevant evidence could be given, and that we have the full materials before us on which to decide the question. There is no dispute as to the proceedings before the umpire, and the learned counsel, who appeared before him, agree as to the course of those proceedings. [The Lord Justice dealt with the facts relating to this part of the case, and came to the conclusion that the award did not include compensation for the sandhills adjoining the 77 yards strip.]

For these reasons I think that the appeal should be allowed and judgment entered for the plaintiffs, and the cross-appeal dismissed. The plaintiffs must have the costs here and below.

The second appeal in these circumstances becomes unnecessary, but I think that the award could not have been remitted and that the judgment of Bailhache J. was right on that point, and that the appeal should be dismissed with costs. It may be that the plaintiffs could have obtained relief under s. 23 of the Lands Clauses Act, 1845, on the ground that the award, if it included the sandhills mentioned, was a bad award and that the matter should be sent before a jury, but I have not thought it necessary to consider this, and give no opinion upon it.

WARRINGTON L.J. read the following judgment:—There are at Mablethorpe, on the sea coast of the county of Lincoln, between the foreshore and the enclosed lands in the district, certain open or waste lands locally known as the sandhills. Immediately at the foot of the sandhills on the landward side is a road called Furlong Road, occupying approximately the site of an old dyke or cut. Beyond this road is a strip of cultivated land, and beyond that a

cut constructed by the Commissioners of Sewers for the county of Lincoln in the year 1802. The sandhills are a natural barrier to the encroachment of the sea, and appear to have been formed gradually by the action of the sea. They would thus prima facie be properly treated as accretions to the adjoining land, and would pass by conveyances of that land if framed so as to include them. The Commissioners have certain jurisdiction, powers, and rights over the sandhills for the purposes of sea defence and land drainage.

The plaintiffs, who are, or claim to be, entitled in fee simple to certain lands adjacent to the sandhills, also claim to be entitled in fee simple, subject to the jurisdiction, powers, and rights of the Commissioners and to such rights of passage as are enjoyed by the public, to a portion of the sandhills themselves, which portion was on the plan deposited for the purposes of the Act, hereinafter mentioned, marked with the figure 9. They also claim to be entitled to a further part of the sandhills to the north of the portion just referred to. This further part is 77 yards in length, and is the southernmost portion of the part marked 8 on the plan. This was erroneously included in No. 8; it ought to have been included in No. 9.

In the year 1914 an Act was passed, the short title of which is the Mablethorpe Urban District Council Act, 1914. This Act, after referring to the sandhills and mentioning that the Commissioners have certain statutory jurisdiction, powers, and rights over the same for the purpose of sea defence and land drainage, states that interests or rights, other than those of the Commissioners, were claimed in or over the sandhills by the owners of enclosed lands opposite or adjoining thereto, subject to such rights of user of the sandhills as the public had acquired. It then enacts that the sandhills "shall be and the same are (subject to the jurisdiction, powers, and rights of the Commissioners thereover or therein, and to the provisions of this Act) hereby declared to be and shall accordingly be vested in the council" (meaning thereby the defendant council) "freed and discharged from all rights and interests therein (if any) other than as aforesaid."

The Lands Clauses Consolidation Act, 1845, so far as applicable, was incorporated with the Act, the council being treated as the "undertakers," and provision was made for the ascertainment of

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compensation payable to any person owning the sandhills, or any part thereof, or having any interest at the passing of the Act, provided that within six months after the passing of the Act he should give notice in writing to the council of the nature of the lands and of the interest in respect of which he claimed compensation and the amount of compensation so claimed. The Act was passed on July 8, 1914.

On January 7, 1915, the plaintiffs gave a notice to the council stating that they were the owners in fee of the sandhills numbered 9 on the deposited plan, and claimed 1437*l.* 10*s.* compensation for their interest. On May 25, 1915, having discovered the mistake in the deposited plan, they gave a further notice stating that the plan had been found to be erroneous, and had been amended by the addition of certain land belonging to them on the north border of No. 9, being in fact the 77 yards above mentioned, and that instead of the 1437*l.* 10*s.* claimed in the original notice the plaintiffs claimed as compensation in respect of claim No. 9 as amended the sum of 1680*l.*

The arbitration duly proceeded, and on August 31, 1915, the umpire made his award by which he awarded 679*l.* 5*s.* as the amount of the purchase-money and compensation to be paid by the council for the interest of the plaintiffs of and in the portion of the sandhills numbered 9 on the deposited plan. The arbitrator makes no reference to the amended claim or to the mistake in the deposited plan, but in the proceedings before him the only plan upon which he and the parties worked was the plan in which the 77 yards were included in No. 9. It was assumed in the Court below that when he refers to No. 9 on the deposited plan he means the entire length claimed by the plaintiffs, including the 77 yards added by amendment.

This action was brought to enforce the award. The learned judge, Bailhache J., found that the plaintiffs had established their title to all but the 77 yards by virtue of the Statute of Limitations, but that they had not established their title to the 77 yards. In the result he held that, the award being, as it was then assumed to be, an entire award, the action of the plaintiffs must fail, unless the omission to distinguish between the compensation awarded for the whole of the land and the 77 yards could be rectified, and on a

subsequent application to remit the matter for this purpose, it appearing that the umpire was dead, he held that under the circumstances this could not be done, and he accordingly gave judgment for the defendants.

The present appeal is from that judgment and from the order refusing to remit the award. The defendants have given a cross-notice of appeal, which in effect challenges the learned judge's decision in the plaintiffs' favour as to the bulk of the sandhills included in No. 9.

The question to be determined is whether the plaintiffs have established their claim to the portion in question of the sandhills. The title to the inlands is not directly in issue, inasmuch as none of the conveyances to the plaintiffs or their predecessors is so framed as to include the sandhills adjacent to the land conveyed. Their title to the sandhills is acquired, if at all, by virtue of the Statute of Limitations. It is, however, material to consider the plaintiffs' title to the 77 yards of inlands, inasmuch as the defendants insist that their interest is a tenancy only, and that any interest they may have acquired in the sandhills must be presumed to be also of that nature. Treating the sandhills as a whole, i.e., for the moment drawing no distinction between the bulk and the 77 yards, I agree with Bailhache J. (1.) that they are not vested in the Commissioners, and (2.) that the acts of ownership referred to by the learned judge in his judgment are under the circumstances sufficient to give the plaintiffs a title by virtue of the Statute of Limitations.

As to the first point, it is enough to say that the question was decided adversely to the Commissioners seventy-four years ago by the Court of Exchequer in *Stracey* v. *Nelson* (1) on the true construction of s. 47 of 3 & 4 Will. 4, c. 22. That decision had a very important bearing on the position of Commissioners of Sewers all over the country, yet it does not appear to have been questioned in the Courts, though it is more than once referred to, nor has any attempt been made by Parliament to alter the law as expressed by it. In fact the decision appears to have been acquiesced in by the parties affected. The Act of 1914 itself only treats the Commissioners as having certain jurisdiction, powers and rights over the sandhills. Neither the statement by Wood V.-C. in *Crossman* v. *Bristol and*

(1) 12 M. & W. 535.

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South Wales Union Ry. Co. (1) as to his impression formed on an interlocutory application and without argument as to the effect of s. 47, nor the decision of the Court of Appeal in *West Norfolk Farmers' Manure Co.* v. *Archdale* (2), in which the construction of s. 47 did not come in question at all, seems to me to impair the authority of *Stracey* v. *Nelson* (3), and even if I disagreed with the conclusion arrived at in that case, which I do not, I should be of opinion that it would be improper now to overrule it. It makes to my mind little, if any, difference whether the conclusion arrived at is reached by the path adopted by Lord Abinger or by that preferred by Parke B., but if I had to choose between them I should prefer that chosen by Lord Abinger.

As to 2, the position is this: We have to consider the title to a sandy waste, useless for all ordinary purposes for which land is used. We should not in such a case expect to find such acts of ownership as are relied on in ordinary cases, as, for example, exclusive possession by means of enclosure and so forth. What we do find is that for more than twelve years before the date of the Mablethorpe Urban District Council Act of 1914, whenever the question of ownership became material, as, for example, whenever some one desired to place an erection of any sort on the land, the right of the plaintiffs, or their predecessors, was asserted and their claim acquiesced in, and there is no trace of any assertion of adverse right by any other person or body. I agree with Bailhache J. that the action of the Commissioners in requiring by virtue of their jurisdiction over the sandhills that persons, intending to make erections on the sandhills, should obtain their licence to do so does not prevent the acquisition of title by those persons. A tenant in fee simple may well have to obtain such a licence. This conclusion disposes of the defendants' cross-notice, and if there were no further question I should be of opinion that the plaintiffs' title to the whole strip of sandhills was established.

But it is said that while the opinion I have expressed may be correct as to the bulk of the sandhills, there is a distinction between it and the 77 yards, and that as to the latter the plaintiffs are estopped from setting up any claim thereto other than a tenancy. Some

(1) 1 H. & M. 531. (2) 16 Q. B. D. 754.
(3) 12 M. & W. 535.

further facts must now be stated. In the year 1802 the Commissioners, on the petition of the proprietors and occupiers of land in Theddlethorpe, Mablethorpe, and Witham, constructed the new cut already referred to. As this cut was of special value to Theddlethorpe, it was arranged that the proprietors and occupiers of land in Theddlethorpe should pay a certain proportion of the expenses, and in particular should pay for the lands to be cut and rendered useless in making the new cut. The result of what was done was to leave between the new cut and the sandhills the strip of cultivated land above mentioned. There appears to be no ground whatever for the suggestion, which was supported only by a piece of mere gossip, which, if it had been admissible at all, had in my opinion no weight, that in some way the strip was purchased by the parish of Theddlethorpe, whatever this may mean. It is, however, the fact that for very many years a man named Gray, and apparently others before him, who occupied a portion of the strip of which the 77 yards was the southern part, paid 10*s.* a year which is entered in the Commissioners' accounts and is therein credited to Theddlethorpe. Since 1836 it is described in the accounts as rent, and receipts given to Gray refer to it as rent, but there is no evidence as to how or by whom the successive occupiers were let into possession, nor is there any trace of a tenancy having been created in fact; but it is said that a man who pays rent and those claiming under him are estopped from denying the existence of a tenancy. The rent appears to have been paid to the dykereeve of Theddlethorpe, and as the sums received appear in the Commissioners' accounts he presumably received it as an officer of the Commissioners, and it is they, I apprehend, who would, by the application of the doctrine of estoppel, be the landlords. There is no evidence that either William Gray, or any of the persons who occupied the strip before him, exercised any rights of ownership over the sandhills.

By a deed dated January 27, 1886, Gray conveyed the 77 yards to one Ranshaw in fee simple in which the lands were so described as not, in my opinion, to be sufficient to comprise such interest, if any, as was then vested in Gray in the adjacent portion of the sandhills. From the date of this conveyance no rent was paid by Ranshaw or his successors, but Gray and those who came after him continued to pay the 10*s.* a year for the ground

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remaining in their possession. On February 1, 1886, Ranshaw granted to Colonel Hutton, the officer commanding the local Artillery Volunteers, a lease of "the right of Ranshaw to, over, and upon such of the sandhills in Mablethorpe as is enclosed by a fence to be made, which enclosure is about 70 feet by 60 feet, and adjoins and is part of the frontage to a piece of land there containing one rood recently purchased by the said A. Ranshaw from William Gray," being the land conveyed by the deed of January 27, 1886. This lease was for fourteen years for the purpose of a practice battery, and the rent was 1*l.* The battery was made and used and the rent duly paid. This lease having expired, Ranshaw on February 11, 1901, granted a further lease to the then commanding officer for seven years from February 1, 1900, at a rent of 2*l.* By a deed dated April 4, 1901, Ranshaw conveyed the 77 yards of inland in fee simple to Nesbitt under whom the plaintiffs claim. The description of the parcels was in substance the same as that in the conveyance of 1886, and did not comprise the adjoining portion of the sandhills, but Ranshaw has never claimed that it remained vested in him. On the contrary, after the execution of the conveyance Nesbitt entered into possession, and received the rent of 2*l.* a year until 1903, when the battery was given up and the rent ceased to be paid. The title of Ranshaw was, in my opinion, barred at the expiration of twelve years, that is to say, in February, 1913. Meanwhile Nesbitt, and after him the plaintiffs, were since 1894 in possession as tenants in fee simple of the remainder of the sandhills No. 9 on the plan and of the corresponding inlands.

Treating the sandhills as a separate hereditament apart from the adjoining inlands, the plaintiffs' title is clear. Ranshaw entered into possession and held the land for more than twelve years. After the conveyance of 1901 Nesbitt, in his turn, entered into possession, and he and the plaintiffs as his trustees had been in possession for more than twelve years prior to the passing of the Act of 1914.

But the plaintiffs say the title to the 77 yards of sandhills is dependent upon the title to the adjoining 77 yards of inland, relying on the presumption that a tenant occupying land adjoining his holding must be taken to have added it to the latter. An illustration of the application of this presumption is to be found

in *Andrews* v. *Hailes*. (1) I am of opinion that the presumption would not apply in the present case. Ranshaw and after him Nesbitt and the plaintiffs believed themselves entitled in fee simple to the adjoining land, and I can see no reason why they should be presumed to have acquired anything but a title in fee simple to the sandhills. Certainly the case does not come within either the facts in *Andrews* v. *Hailes* (1) or the reasoning on which the judgments are founded.

But assuming that the presumption applies, the defendants have still to make out that Ranshaw and after him the plaintiffs became entitled to something less than a fee simple in the 77 yards of inland. They rely on the doctrine of estoppel by payment of rent. But Ranshaw and the Nesbitts had possession of the land for upwards of thirty years under conveyances in fee simple without paying any rent; the payment by William Gray and his successors appears to have been quite unknown to them. The Grays were not their agents to make the payment, and I can see nothing from which it could be inferred that the rent was either paid or received otherwise than in respect of that part of the land which was retained by the Grays. The case is something like that of *Meredith* v. *Gilpin* (2); see the judgment of Wood B. It is unnecessary to decide whether by virtue of the doctrine of estoppel Gray ought to be treated as holding the land as a mere tenant. I feel considerable doubt on this point. It is important in such cases to know by whom the alleged tenant was let into possession (see per Lord Denman C.J. in *Doe* v. *Barton* (3)), and as to this in the present case we know nothing. There is only the bare fact of payment of an annual sum called rent to an officer of persons in whom the land does not appear to have been vested. I only say this much lest it be supposed that I accept without question the assumption that the Grays are for the present purpose to be treated as mere tenants.

For these reasons I am of opinion that the judgment of Bailhache J. ought to be reversed, with the result that judgment ought to be entered for the plaintiffs for the amount found due to them by the award.

So far I have proceeded on the footing that the meaning of the

(1) 2 E. & B. 349. (2) (1818) 6 Price, 146, 153.
(3) (1840) 11 Ad. & E. 307, 312.

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award acted on in the Court below is the correct meaning. On the whole I think it is more probable, on the true construction of the award, that the umpire intended to award compensation only on the plaintiffs' original claim. He refers to this alone, and awards compensation in respect of No. 9 on the deposited plan without mentioning any amendment thereof, and he had been told in the course of the proceedings that if he entertained a claim made after the six months he would be asked to state a case. I see no reason why this point should not be open to the appellants. If this view of the true effect of the award is correct, it is in itself sufficient to decide the case in favour of the appellants. In the view I take of the merits, the question of procedure does not arise, and it is unnecessary to consider how, if at all, the amount of compensation could be apportioned between the 77 yards and the rest of the land had it been necessary to do so. The application to remit the award was in fact unnecessary, and I think the appeal from the order dismissing it should be dismissed with costs. The plaintiffs, however, ought to have the costs of the action and of the appeal from the judgment.

SCRUTTON L.J. read the following judgment:—To the north of the seaside resort of Mablethorpe, in Lincolnshire, a line of sandhills lies between the North Sea and the cultivated lands or "inlands," and serves as a sea bank or defence against high tides, which, but for the sandhills, would flood large portions of Lincolnshire. The urban district council of Mablethorpe desired, in view of the future of that place, to acquire the sandhills, and accordingly procured the passing of the Mablethorpe Urban District Council Act, 1914, which received the Royal assent on July 8, 1914. That Act recites (1.) that the sandhills have at all times been and still are open to and freely used by the public; (2.) that the Commissioners of Sewers have certain statutory jurisdiction, powers, and rights over the sandhills for the purpose of sea defence and land drainage; (3.) that interests or rights (other than those of the Commissioners) are claimed in or over the sandhills by the owners of enclosed lands opposite or adjoining thereto subject to such rights of user as the public shall have acquired; (4.) that it is desirable that the sandhills (subject to the jurisdiction, powers, and rights of the Commissioners and to

the provisions of the Act) should be vested in the council freed and discharged from all interests and rights therein other than those of the Commissioners, and that, so far as such rights or interests exist, provision should be made for payment of compensation as in the Act provided; (5.) that a plan of the sandhills and a book of reference containing the names of the owners were duly deposited with the clerk of the peace for the Parts of Lindsey. In this plan and book Nesbitt appears as the owner of a plot marked 9, described as "sandhills and frontage," and Gray as the owner of an adjoining plot marked 8 similarly described, the boundary between them being clear on the plan. The Act by s. 4 then vests the sandhills in the district council (subject to the jurisdiction, powers, and rights of the Commissioners) and freed and discharged from all other rights and interests therein, if any. The Lands Clauses Acts are then incorporated, and it is provided that any person owning the sandhills or any part thereof, or having any interest therein at the passing of this Act, shall be entitled to compensation accordingly, provided that within six months after the passing of the Act (i.e., by January 8, 1915) he shall have given notice in writing to the council of the nature of the lands and of the interest in respect of which he claims compensation and the amount of compensation so claimed.

Accordingly on January 7, 1915, the Nesbitt trustees gave notice that they were owners in fee simple of the plot of sandhills No. 9 in the deposited plan, and claimed 1437*l.* 10*s.* Then came a circumstance which has occasioned great confusion in this case. It was discovered that the boundary between Nos. 8 and 9 was in the view of Nesbitt's trustees, the alleged owners of plot 9, and of Gray, the alleged owner of plot 8, wrongly delineated in the deposited plan, and, after the statutory six months had expired, both Nesbitt's trustees and Gray gave notice of amended claims. Nesbitt's claim was on May 25, 1915, amended by a statement that "the deposited plan has since been found to be erroneous and has been amended by the addition of certain land on the north border thereof belonging to our clients," and the increased sum of 1680*l.* was claimed. This added land was opposite to a strip of inlands 77 yards in frontage, which is subsequently referred to as "the 77 yards strip." Gray's claim for plot 8 was reduced in area, but, curiously enough,

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increased in amount. The matter then came before the umpire, Mr. Chatfield Clarke. He was apparently only given the amended deposited plan, but we were told that counsel for the district council, without taking the objection that the amended claim was made after the statutory six months allowed for making claims, did object to any increase being made in the original claim, and asked the umpire to state a special case if he dealt with any such increase. The umpire on August 31, 1915, made his award. He recited the Act and the six months' provision, the date of the passing of the Act, and the date of the original claim, which, as he accurately recites, related to lands No. 9 in the deposited plans. He made no recital as to the amended claim or the amended plan. He then awarded 679*l.* 5*s.* in respect of the lands. We were informed, after the hearing, that the umpire dealt with Gray's claim in the same way; he recited the original claim only, and gave him an award in respect of the lands numbered 8 on the deposited plans and book of reference.

The claimants then proceeded to prove title in an action to enforce the award, which they treated as referring to the lands in the amended claim, including the sandhills opposite the 77 yards strip. The district council objected (1.) to the whole title, that the sandhills belonged to the Commissioners of Sewers or did not belong to the claimants; (2.) to the title to the 77 yards strip, that the inlands 77 yards long, to which the sandhills were said to be appurtenant or accessory, did not belong to the Nesbitts, because Gray, their predecessor in title, had for many years been paying and was still paying in respect of it a rent of 10*s.* a year to the dykereeve of Theddlethorpe, who was, or was the agent for, the true owner.

On the action coming before Bailhache J. he decided against all the district council's objections, except that relating to the title to the 77 yards strip, which he found to be a good objection. But the umpire had assessed one lump sum for the lands he was valuing, and the learned judge held that, if title failed as to part of these lands, there was no enforceable award, as there was no assessed value for the part of the lands to which the title was proved. Meanwhile the umpire was dead, and the award could not be remitted to him to revalue the part. The learned judge, on consideration, declined to remit the award to other arbitrators, and I think he was right. The remedy, if an award proves to be abortive, appears to me

to be, as stated by Wood V.-C. in *Lind* v. *Isle of Wight Ferry Co.* (1), to proceed under s. 23 of the Lands Clauses Act, 1845, to assess compensation by a jury. But neither side appears in the Court below carefully to have considered what the award really was, and only when the appeal came on did the claimants suggest that the umpire had really only awarded compensation in respect of No. 9 in the original plans and on the original claim. If this had been established below, the learned judge's judgment in the result would have been in favour of the plaintiffs. It is true that the matter was not investigated below, but as the umpire is dead and could not be asked as to his intention or admit any mistake, and as it was admitted that he had the amended plan, and that there was an objection taken before him to a claim increased in amount, I do not see that any useful evidence could be given, if the language of the award is clear. And it appears to me to be clear; it recites the original claim only, and refers to the deposited plans, and it does not state any special case. It recites dates to show the original claim was made within the statutory six months. I have come to the conclusion that the umpire awarded with respect to the original claim only, in this carrying out the statutory provision that the claim must be made within six months, and that therefore the objection to the award, which the judge below found a good one, namely, that it includes in an unsevered amount of compensation a piece of land to which the claimants have proved no title, is not relevant, and on this head the plaintiffs should succeed, unless any of the objections which the defendants made to the title in the original claim were really good.

As, however, the judge below decided the question as to the 77 yards strip, and it was argued before us, I think it right to state my view on it. The land in question appears to be a long narrow strip, partly composed of the bed of the old cut, an ancient drain for the fens, and partly of land between it and the new cut, on which spoil from the new cut was deposited. I think it is established that in 1802 the lands in Mablethorpe taken for the new cut, and damaged or otherwise rendered useless by the spoil from it, were paid for by the landowners in the parishes of Theddlethorpe, which were drained by the new cut; that the dykereeve of Theddlethorpe collected a rate from these landowners to pay

(1) 7 L. T. 417.

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the cost of the lands so taken and damaged; and that the land between the old cut and new cut amounting to 2 roods 24 poles was described as land taken. Further, from 1807 on rent is entered in the Theddlethorpe accounts as received in respect of garden ground in Mablethorpe, the amount from 1833 on appearing as 10*s.*, and in 1850 becoming identified as "Rent of garden from William Gray. Ten shillings," in which form it continues in the account which the dykereeve of the parishes of Theddlethorpe All Saints and Theddlethorpe St. Helens renders to the Commissioners of Sewers down to the present day, Gray and his descendants having continued to pay it in respect of the land they hold between the old and new cut. On the principle laid down in *Goodman* v. *Saltash Corporation* (1), I think it would be the duty of the Courts to try and find a legal origin for this long-continued payment, as Bailhache J. has done in the view that Gray is tenant of the land to some one whom the dykereeve of Theddlethorpe represents. But in my view it is not necessary to do this. For the title of the 77 yards strip is this. In January, 1886, Gray conveyed the fee simple of the 77 yards strip to Ranshaw, who in 1901 conveyed it to Nesbitt, who has held it ever since, without paying any rent to the dykereeve or any claim to rent. This thirty years' occupation as in fee simple of the inlands strip gives Nesbitt, in my view, ample title against any person whom the dykereeve represents, and is not affected by the fact that Gray, unknown to Nesbitt or Ranshaw, was paying rent to the dykereeve for this and other land. While the view I take as to the award renders this point unnecessary for decision, I am not, as at present advised, able on this point to agree with the view of the judge below.

It remains to consider the objection raised by the district council to the whole title, on which the judge decided against them. I do not think in this case that the ownership of the inlands gave the ownership of the sandhills between the inlands and the foreshore; for the inlands were conveyed by metes and bounds and dimensions, and there was no conveyance of the sandhills in front of them. The title to the sandhills must be rested on adverse possession based on acts of ownership, and, unless any statutory title of the Commissioners interferes, there appear to be sufficient claims of

(1) (1882) 7 App. Cas. 633.

title to the sandhills by the exercise of acts of ownership such as letting part of them, including one letting to the district council themselves, to justify the learned judge's finding that a title has been acquired by adverse possession.

The question of the interest of the Commissioners turns on the meaning of the Sewers Act of 1833 (3 & 4 Will. 4, c. 22), s. 47, which contains, amongst numerous other words, the words "the property in all lands . . . . which shall be under the view, cognizance, or management of any Commissioners of Sewers shall be vested in the Commissioners." It was said that these words mean what they say, and the Commissioners have the property in all lands which they manage or control. There is no provision for compensation in the Act. Struggling to avoid the view that Parliament had confiscated private property without compensation, the Court of Exchequer in 1844 in the case of *Stracey* v. *Nelson* (1) succeeded in limiting the words of the Act so as not to vest in Commissioners property previously owned by private individuals. Lord Abinger did it in one way; Parke B. in another; two Barons concurred without stating with whom they concurred. We were invited to overrule this case; but it has stood for seventy years, and many titles must have been acquired on the faith of the decision; it was mentioned without disapproval by Willes J. in *Wadmore* v. *Dear* (2), and by the Court of Common Pleas in *Winch* v. *Thames Conservators* (3), where Bovill C.J. said: "The Court of Exchequer Chamber also laid down that, generally speaking, in the absence of express words, the Courts were not inclined to infer that statutes of this kind gave more than such a use of the soil as was necessary for the purposes of the navigation; and a similar view was taken by the Court of Exchequer in the case of *Stracey* v. *Nelson* (1) with respect to Commissioners of Sewers." And when in *Coverdale* v. *Charlton* (4) the Court of Appeal began the elucidation of the interest conveyed to a public authority in whom a street "vested," Cotton L.J. again cited *Stracey* v. *Nelson* (1) without disapproval. Whether I should have construed or limited the words of the statute in the same way and to the same extent is in my view immaterial; the case is of too long standing to be overruled. I agree with the

(1) 12 M. & W. 535.
(2) L. R. 7 C. P. 212, 223.
(3) L. R. 7 C. P. 468.
(4) 4 Q. B. D. 124.

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reasons which Bailhache J. has given for his judgment on this point. While the statute undoubtedly gives the Commissioners powers of control over the land of another, I am bound by *Stracey* v. *Nelson* (1) to hold it does not make them owners of that land.

In my opinion, therefore, the appeal in the action succeeds, and judgment should be given for the plaintiffs for the amount awarded, this being in respect of lands No. 9 in the original claim.

First appeal allowed and cross-appeal dismissed; second appeal dismissed.

Solicitor for plaintiffs: *Richard Brooks, for Haddon Owen & Son, Louth.*

Solicitors for defendants: *Arthur Taylor & Co., for Sharpley & Son, Louth.*

W. F. B

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April 9.

BLAIN, APPELLANT *v.* KING, RESPONDENT.

Dentist—Unregistered Person—"Name or title of dentist"—"Take or use"—Statement made in Witness-box—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *s.* 3.

The appellant was an artificial teeth specialist, and was not a registered dentist. When giving evidence in a county court he stated, in answer to a question put to him by the judge, that he was a dentist. In respect of this statement he was charged for that he did unlawfully "take or use the name or title of 'dentist,'" contrary to s. 3 of the Dentists Act, 1878. The justices, being satisfied on the evidence that the appellant had held himself out in public to be a dentist, convicted him of the offence charged:—

Held, by Darling and Avory JJ., Shearman J. dissenting, that there was evidence on which the justices could find that the appellant had committed the offence with which he was charged.

CASE stated by justices for the borough of Shrewsbury.

On July 28, 1917, the appellant, Samuel Blain, appeared before the justices in answer to an information laid by the respondent

(1) 12 M. & W. 535.

under s. 3 of the Dentists Act, 1878 (1), which alleged that the appellant on February 16, 1917, within the said borough, not being a legally qualified medical practitioner and not being registered under the Dentists Act, 1878, did unlawfully take or use the name or title of "dentist," implying that he was registered under the Act.

On the hearing of the information the following facts were proved: The appellant was an artificial teeth specialist carrying on business in Shrewsbury, but he was neither a registered dentist nor a legally qualified medical practitioner.

On February 16, 1917, at the county court of Shropshire holden at Shrewsbury, before his Honour Judge Tobin, the appellant stated when giving evidence in open Court upon oath in the witness-box, and in reply to questions put to him by the judge, that he was a dentist.

For the appellant it was contended that if he had stated that he was a dentist it was not a taking and using of the name or title of dentist; that the appellant had not held himself out as a dentist, and that, even if he had done so when before the county court judge, one instance would not be sufficient and would not constitute a taking and using of the name or title of dentist.

The justices, being satisfied upon the evidence that the appellant did hold himself out in public to be a dentist, determined that the appellant was guilty of the offence charged in the information, and accordingly they convicted the appellant.

The question for the opinion of the Court was whether the justices upon the above facts came to a correct decision in point of law.

(1) Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3: "From and after the first day of August one thousand eight hundred and seventy-nine, a person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.

"Any person who, after the first day of August one thousand eight hundred and seventy-nine, not being registered under this Act, takes or uses any such name, title, addition, or description as aforesaid, shall be liable, on summary conviction, to a fine not exceeding twenty pounds; provided that nothing in this section shall apply to legally qualified medical practitioners."

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R. H. Norris, for the appellant. The Dentists Act, 1878, does not make it illegal for an unregistered person to practise dentistry. What is prohibited is the taking or using by an unregistered person of the name or title of dentist or any other name or title which implies that he is registered under the Act. In order to constitute an offence there must be a taking or user in connection with the carrying on of a dental business. A mere statement that a man is a dentist, made in circumstances and on an occasion in no way connected with the carrying on of the business of dentistry, is not an offence. Further, the fact that a person has on one occasion only stated that he is a dentist is not sufficient evidence to prove that he has taken or used that name: *Robertson* v. *Hawkins*. (1)

Sandlands, for the respondent. There is nothing in the language of s. 3 to indicate that the offence of taking or using the name or title of dentist by an unregistered person is confined to a taking or user in connection with the carrying on of a dentistry business, nor is it necessary that the taking or user should be such as to raise the implication that the person is a registered dentist or is a person specially qualified to practise dentistry. The words of implication in s. 3 refer only to the immediately preceding words "or any name, title, addition, or description." The word "take" is satisfied by evidence of a taking on one occasion only. [He referred to *Bellerby* v. *Heyworth* (2) and *Attorney-General* v. *George C. Smith, Ld.* (3)]

R. H. Norris replied.

SHEARMAN J. In this case I have the misfortune to differ from the other members of the Court. In my opinion the magistrates came to a wrong decision. The appellant was an artificial teeth specialist, but was not registered under the Dentists Act, 1878, and was not a legally qualified dental practitioner. He was charged under s. 3 of the Act with having unlawfully taken or used the name or title of "dentist." It was proved that he was called as a witness in a county court and on being asked what he was, he stated, on oath, that he was a dentist. On those facts the magistrates convicted him. In my view, looking at the Act as a whole, and especially at the preamble, what the Act strikes at is attempts by

(1) [1913] 1 K. B. 57. (2) [1910] A. C. 377.
(3) [1909] 2 Ch. 524.

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unqualified persons to obtain dentistry patients by describing themselves as qualified when in fact they are unqualified. In order that a person may be convicted of an offence under s. 3 there must be proof of mens rea in the sense, laid down in the case of *Bank of New South Wales* v. *Piper* (1), of a deliberate intention to do an act forbidden by statute. One has, therefore, to consider what it is that is forbidden by this Act. In my opinion the Act was intended to prohibit an unqualified person who is practising, or attempting to practise, dentistry from describing himself as being a qualified dentist. I do not think that a person who, when merely giving a description of himself in the witness-box, states that he is a dentist is guilty of an offence under s. 3.

AVORY J. In my opinion this appeal should be dismissed. I think that there was evidence on which the magistrates could find, as they did, that the appellant held himself out in public to be a dentist, and, that being so, that the magistrates rightly held that the appellant was guilty of the offence charged. I desire, in the first place, to point out that the concluding words of the information, "implying that he was registered under the Act," were in my opinion surplusage. Under s. 3 it is a complete offence in itself for a person to take or use the name or title of "dentist" or "dental practitioner" unless he is registered under the Act or is a legally qualified medical practitioner. Sect. 3 makes it another, and a separate, offence for an unregistered person to take or use "any name, title, addition or description, implying that he is registered under this Act or that he is a person specially qualified to practise dentistry." That construction of s. 3 is borne out by the decision of this Court in *Robertson* v. *Hawkins* (2), where Lord Alverstone C.J. said: "It is clear that if the title 'dentist' or 'dental practitioner' is used, for instance, on a plate on the hall door underneath the unregistered person's name, an offence is committed against the Act." The same view was expressed in *Bellerby* v. *Heyworth* (3) by Buckley L.J. (whose judgment was approved of by the House of Lords (4)) where he said, after quoting from the judgment delivered by the Lord Justice-Clerk in the Scotch case of

(1) [1897] A. C. 383.
(2) [1913] 1 K. B. 61.
(3) [1909] 2 Ch. 23, 33.
(4) [1910] A. C. 377.

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Emslie v. *Paterson* (1): "I think that under this Act of Parliament any man may say that he does dental acts, but he must not, unless he is a qualified person, say that he does them as a dentist. He must not describe himself as being a person of a particular kind, but he is entitled to say that he is there to do a particular class of acts."

The only question, therefore, in this case is whether there was any evidence on which the magistrates could find as a fact that the appellant took or used the name or title of "dentist." It would, in my opinion, be an undue limitation of the provisions of the Act to say that the offence is committed only when a person takes or uses the name with a view to getting patients or with the intention of advertising a dentistry business. If a man holds himself out as a dentist, either by means of an announcement on his door-plate, or by a verbal statement made in the street or in a Court of justice in the locality where he lives that he is a dentist, then there is, in my opinion, a taking or user of the name or title of "dentist" within the meaning of s. 3.

For these reasons I think that there was evidence on which the magistrates could find that the appellant had committed the offence with which he was charged, and that this appeal fails and must be dismissed.

DARLING J. I agree that this conviction should be affirmed. The preamble to the Dentists Act, 1878, recites that "it is expedient that provision be made for the registration of persons specially qualified to practise as dentists in the United Kingdom, and that the law relating to persons practising as dentists be otherwise amended." It is then enacted by s. 3 as follows: [The learned judge read s. 3, and continued:] It has been contended for the appellant that it is not an offence to take the name of dentist unless the taking is of such a character and in such circumstances as to raise the implication that the person is registered under the Act, or is specially qualified to practise dentistry. In my view the first part of s. 3 means that no person other than a registered dentist shall take the name of dentist in any circumstances, and the reason why I take that view is that I think the intention of the framers of the Act,

(1) (1897) 24 R. (Just. Cas.) 77.

as expressed by s. 3, was that the name of dentist is to be used only by persons who are registered or qualified under the Act, and that if any other name or description than dentist is used, and the name or description is such as to imply that the person using it is registered or is specially qualified to practise dentistry, that user is also made an offence. But if the name "dentist" alone is used by an unregistered person, that in itself is an offence, without any necessity of proving the implication.

Therefore the only question in this case is whether the appellant did take or use the name of "dentist" within the meaning of s. 3, but I think one must have regard to the language of the proviso, not for the purpose of seeing whether the user was such as to raise the implication, but whether it was likely to injure those who practise as registered dentists. If the magistrates had been satisfied that the use of the name "dentist" by the appellant had nothing whatever to do with the practice of dentistry, if, for example, the appellant had described himself as a dentist in order to avoid arrest, I think the justices would have been entitled to acquit the appellant. But the facts found by the justices show that the appellant, who was an artificial teeth specialist in Shrewsbury and was not a registered dentist, when giving evidence in the Shrewsbury County Court, stated, in reply to a question by the judge, that he was a dentist. Those being the facts, I think that there was evidence on which the magistrates could come to the conclusion that the appellant meant that he was a person entitled to practise dentistry and was registered as a dentist under the Act. There was therefore evidence on which the magistrates could convict the appellant of taking or using the name or title of "dentist" within the meaning of s. 3 of the Act of 1878.

Appeal dismissed.

Solicitors for appellant: *Lumley & Lumley, for B. D. J. Hayes, Shrewsbury.*

Solicitors for respondent: *Burton, Yeates & Hart, for Tangye, Glaisyer & Atkinson, Birmingham.*

F. O. R.

1918
April 11.

JONES, Appellant *v.* WILSON, Respondent.

Revenue—Excise—Male Servant—Proceedings for Penalty—Necessity for specific Authorization of Proceedings by Local Authority—Revenue Act, 1869 (32 & 33 *Vict. c.* 14), *s.* 19—*Finance Act*, 1908 (8 *Edw.* 7, *c.* 16), *s.* 6.

By s. 6 of the Finance Act, 1908, and the Order in Council made in pursuance thereof dated October 19, 1908, the power to levy the duties on certain local taxation licences is transferred from the Commissioners of Inland Revenue to county councils and county borough councils, and by art. I. of the Order in Council it is provided that county councils and county borough councils "shall have . . . . all powers and duties now vested in the Commissioners of Inland Revenue for carrying into execution" the enactments relating to those duties:—

Held, that no greater power was thereby transferred than that formerly possessed by the Commissioners of Inland Revenue, and inasmuch as, prior to the transfer, no proceedings at the instance of an officer of Inland Revenue in respect of these licences could be commenced without an order of the Commissioners, similar proceedings after the transfer could only be commenced by an officer of a county council or county borough council on being specifically authorized to do so by the council.

Case stated by the stipendiary magistrate for Merthyr Tydfil.

The respondent, the chief constable for the county borough of Merthyr Tydfil, preferred an information against the appellant for having on November 30, 1917, unlawfully kept a male servant without having taken out a licence.

On November 18, 1908, by virtue of the Finance Act, 1908 (1),

(1) Finance Act, 1908, s. 6, sub-s. 1: "The power to levy the duties on local taxation licences to which this section applies shall, as from the date to be fixed by Order in Council under this section, be transferred . . . . to county councils . . . ."

Sub-s. 2: "His Majesty may, by Order in Council, fix the date of the transfer under this section, and make any such further provisions as it appears necessary or expedient to make in order to give full effect to the transfer . . . ."

Sub-s. 4 includes the duties on licences for male servants among the local taxation licence duties to which the section applies.

Sub-s. 5: "The expressions 'county' and 'county council' in this section respectively include a county borough and the council of a county borough."

and an Order in Council dated October 19, 1908 (1), relating to local taxation licences, the general purposes committee of the county borough council of Merthyr Tydfil recommended that the powers and duties then exercised or performed by officers of Inland Revenue be delegated to the town clerk, borough controller, and chief constable respectively, the appointments to be determined at the pleasure of the said council. The committee further recommended "that all matters appertaining to local taxation licences be dealt with by the watch committee."

At the hearing the appellant raised a preliminary objection to the validity of the information on the ground that no order of the county borough council or watch committee authorizing proceedings against the appellant had been obtained by the respondent.

The magistrate held that inasmuch as the county borough council had delegated the powers and duties of an officer of Inland Revenue to the respondent as chief constable, such delegation was a sufficient authority and order to the respondent to take these proceedings. He further found on the facts that the person whom the appellant was charged with having employed as a gardener was a male servant within s. 19 of the Revenue Act, 1869, and that he had not taken out a licence. The magistrate accordingly convicted the appellant, but stated this case as to whether his determination on the preliminary objection was correct in law and whether there was evidence to support his finding of fact.

Glen, for the appellant. Prior to the transfer to county councils and county borough councils of the power to levy the duties on

(1) Order in Council of October 19, 1908, art. I.: "Subject to the exceptions and modifications hereinafter stated, every county council shall have within its county all powers and duties now vested in the Commissioners of Inland Revenue for carrying into execution every enactment relating to the duties on the licences to which section six of the Finance Act, 1908, applies. . . ."

Art. IX.: "Every county council may delegate to such of their officers as they may select any of the powers and duties now exercised or performed by officers of Inland Revenue, and any officer so selected shall be subject to the same liabilities as an officer of Inland Revenue."

Art. XVII.: "The expressions 'county,' 'county council' . . . . include a county borough, the council of a county borough . . . ."

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local taxation licences, specific authority to take proceedings in each case had to be given to an officer of Inland Revenue by the Commissioners of Inland Revenue and that authority might be shown by a letter or instructions, or, alternatively, it was to be deemed to have been shown by an allegation in the information that the proceedings were taken by order of the Commissioners: see Excise Management Act, 1827, s. 71; Inland Revenue Regulation Act, 1890, ss. 21, 24; *Dyer* v. *Tulley*. (1) As now by s. 6 of the Finance Act, 1908, and art. I. of the Order in Council of October 19, 1908, county councils and county borough councils are to have "all powers and duties now vested in the Commissioners of Inland Revenue for carrying into execution every enactment relating to" the collection of duties on local taxation licences, it follows that the powers and duties can only be enforced and performed subject to the same restrictions as those to which the Commissioners of Inland Revenue were formerly subject. Specific authority for the laying of an information must be given by the county council or county borough council just as if those authorities were named in the statutes relating to this subject where the Commissioners of Inland Revenue are mentioned. In this case no specific authority was in fact given to the respondent to lay the information, and the magistrate ought, therefore, to have upheld the preliminary objection.

Artemus Jones, for the respondent. It is conceded that prior to the Finance Act, 1908, in a prosecution such as this, an authority from the Commissioners to an officer of Inland Revenue to take proceedings must have been shown. But the transfer effected by the Act of 1908 and the Order in Council has not been accompanied by anything to indicate that the former restrictions on the power of an officer of Inland Revenue are to be preserved in the case of prosecutions by the local authorities. The language of the Order in Council is in very general terms and should not be limited in the way contended for on behalf of the appellant.

DARLING J. In this case a preliminary objection was raised by the appellant to the validity of the information on the ground that no order of the county borough council or watch committee

(1) [1894] 2 Q. B. 794.

authorizing proceedings to be taken against the appellant had been obtained by the respondent. It is quite clear that no such order was in fact obtained by the respondent, and it is admitted that, if the Inland Revenue Commissioners were still the authority for enforcing proceedings, the point made by Mr. Glen would be good. We have therefore to see what was transferred to county and county borough councils by the Finance Act, 1908. By that Act and the Order in Council following thereon, the powers and duties of the Commissioners of Inland Revenue, and no greater powers or duties, were transferred, so that county and county borough councils cannot without specific authorization to one of their officers do what, formerly, the Commissioners could not have done without a similar authorization to an officer of Inland Revenue. Art. I. of the Order in Council clearly shows that the councils are to make use of their powers and perform their duties in precisely the same way as the Commissioners had formerly to exercise and observe them. As in this case no authority was given to the respondent to take proceedings against the appellant, the preliminary objection was good.

AVORY J. I am of the same opinion. No evidence was before the magistrate of any order of the county borough council or watch committee authorizing these proceedings against the appellant, but the magistrate held, as a matter of law, that an order of this nature was unnecessary because, as he said, the county borough council had delegated the powers and duties of an officer of Inland Revenue to the respondent as chief constable, and that delegation was a sufficient authority and order to him to take these proceedings. It is clear from s. 21 of the Inland Revenue Regulation Act, 1890, that an officer of Inland Revenue had no power in himself to take proceedings of this nature without an order of the Commissioners. Consequently it seems to me to follow that no person to whom the duties of an officer of Inland Revenue have been delegated can without an order take those proceedings. That is quite apart from the main point that under the Finance Act, 1908, the power to levy the duties on local taxation licences is transferred to county and county borough councils, His Majesty being empowered to fix by Order in Council the date of the transfer and to

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make such provisions as might appear necessary or expedient to give full effect to the transfer. Under that power an Order in Council was made, and I am satisfied that it does not confer upon county and county borough councils any greater power than that formerly possessed by the Inland Revenue Commissioners. Seeing that no greater power is transferred than that which the Commissioners had, and seeing that no officer of Inland Revenue could take proceedings without an order of the Commissioners, it follows that no chief constable or officer of the council can take proceedings except by order of the council. For these reasons I think the magistrate came to an erroneous decision upon this question of law.

SHEARMAN J. I am of the same opinion. I agree that no greater powers have been transferred to the county and county borough councils than were previously possessed by the Inland Revenue Commissioners. With regard to proceedings for penalties, the Commissioners had specifically to decide upon each case and then delegate to an officer the duty of taking proceedings. For the reasons given county and county borough councils can appoint officers, but they must still give a special order in individual cases, and only then can the officer take proceedings. Here there was no evidence that the chief constable was duly authorized in reference to this particular case.

[On the merits the COURT held that there was ample evidence to support the magistrate's finding that the person employed by the appellant was a "male servant" within s. 19 of the Revenue Act, 1869.]

Appeal allowed.

Solicitors for appellant: *Peacock & Goddard, for D. W. Jones & Co., Merthyr Tydfil.*

Solicitors for respondent: *Gibson & Weldon, for Tom M. Elias, Merthyr Tydfil.*

J. S. H.

OLLETT, APPELLANT *v.* JORDAN, RESPONDENT. 1918 *April* 12.

Public Health—Unsound Food—Fish sent in Fulfilment of an Agreement to sell—Rejection by intending Buyer—"Exposure for sale"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 28.

By s. 117 of the Public Health Act, 1875, a justice is empowered to order the destruction of unsound meat, &c., which, having been exposed for sale and intended for the food of man, has been seized by the sanitary authority; "and the person to whom the same belongs or did belong at the time of exposure for sale" is made liable to a penalty:—

Held, that the expression "exposure for sale" includes an exposure for the purpose of completing an agreement to sell previously entered into.

CASE stated by Eastbourne justices.

The respondent was charged under s. 117 of the Public Health Act, 1875 (1), as extended by s. 28 of the Public Health Acts Amendment Act, 1890 (2), with having exposed for sale, or deposited in a place for the purpose of sale, certain fish intended for the food of man which were unwholesome and unfit for the food of man and which had been duly seized and condemned, he being at the time when the fish were so exposed or deposited for the purpose of sale the person to whom they belonged.

(1) Public Health Act, 1875, s. 116, empowers officers to seize meat, &c., "exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man," which appears to be unsound or unfit for the food of man, and to carry away the same to be dealt with by a justice.

Sect. 117: "If it appears to the justice that any animal carcase . . . . fish . . . . so seized is diseased or unsound . . . . or unfit for the food of man, he shall condemn the same, and order it to be destroyed . . . .; and the person to whom the same belongs or did belong at the time of exposure for sale . . . . shall be liable to a penalty . . . ."

(2) Sect. 28, sub-s. 1, of the Public Health Acts Amendment Act, 1890, extends ss. 116-119 of the Act of 1875 to apply to "all articles intended for the food of man, sold or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale within the district of any local authority."

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The respondent, who was a wholesale fish merchant at Hull, sent a circular dated April 26, 1917, to, among others, the town clerk of Eastbourne, stating that the Government had bought the whole Norwegian supply of herrings, that these formed a splendid food when properly prepared and cooked, that at the request of the Fish Food Controller he was endeavouring to get this food distributed, and requesting the town clerk to ask the various institutions in Eastbourne to apply for particulars, the price being 4*s.* 6*d.* per stone, carriage paid. This circular was forwarded by the town clerk to, among other institutions, the Urmston V. A. D. Hospital, Eastbourne, of which the commandant was Mrs. Burke. On May 4, 1914, Mrs. Burke wrote to the respondent at Hull in reference to his circular, saying, "I should be glad to avail myself of your offer to supply this hospital at the rate of 4*s.* 6*d.* per stone, carriage paid. Could you supply me with about 200 at a time, ... or if you cannot do it in such small quantities, would you kindly let me know the smallest number over 200 that I could have?" On receipt of that letter the respondent forwarded to Mrs. Burke by rail, carriage paid, two boxes containing in all 225 herrings. These were despatched from Hull on May 7, 1917, by the train which left at 6 P.M. and arrived at Eastbourne Railway Station at 11.6 A.M. the next day, where they were put outside the parcels office because "they smelt so," and were delivered at the hospital about 1 P.M. the same day. Soon after their arrival at the hospital, namely, between 2 and 3 P.M. on May 8, one of the boxes was opened and the herrings were then found to smell unpleasantly, but the head cook declined to swear positively that they were then bad. The next morning Mrs. Burke sent for the appellant (the inspector of nuisances), who opened the box which was closed, and, being of opinion that the herrings from both boxes were unwholesome and unfit for the food of man, he seized them and had them examined by a justice, who ordered them to be destroyed. Thereupon Mrs. Burke wrote to the respondent stating these facts and saying that in the circumstances she was unable to send a cheque for the herrings.

Evidence was given by the respondent that the herrings were fresh and fit for food when despatched from Hull, and that on their arrival at Eastbourne they should have been taken out of

the boxes and hung up separately, as if left in the boxes they would ferment.

For the respondent it was contended that to secure a conviction the appellant must prove that the herrings were unsound or unfit for the food of man at the time of the sale; that he had proved that the herrings were sound and fit for the food of man at the time of the sale; and that under s. 18, r. 5, of the Sale of Goods Act, 1893, the property in the herrings passed from the respondent to Mrs. Burke at Hull at 6 P.M. on May 7, 1917, when they were, with the assent of the buyer, unconditionally appropriated to the contract, and in pursuance of the contract delivered to the railway company, carriage paid, for transmission to Mrs. Burke.

For the prosecution it was contended that the herrings were exposed for sale or deposited for the purpose of sale in Eastbourne; that, there being no acceptance of the herrings by Mrs. Burke, they belonged to the respondent; and that there had been no unconditional appropriation to the contract of the herrings within s. 18, r. 5, of the Sale of Goods Act, 1893, inasmuch as that rule requires, where the appropriation is made by the seller, that it should be done with the assent of the buyer, and in this case there had been no assent.

The justices dismissed the information on certain findings, but stated a case for the opinion of the Court. On the case being remitted to the justices for further findings, they, by a majority, found that the herrings were not unfit for human food when they were handed by the respondent at Hull to the railway company for despatch to Eastbourne; that they were unfit for human food when delivered at the hospital at Eastbourne; and that they were deposited for sale at the hospital.

Montgomery, K.C., and *Horton-Smith*, for the appellant. The two questions to be considered are (1.) did the herrings at the material time belong to the respondent; and (2.) were the herrings exposed for sale? Both questions should be answered in the affirmative. As to the first, the property in the herrings was not transferred till Mrs. Burke had an opportunity of examining them to ascertain whether they satisfied the description and were fit for human food; see s. 1, sub-s. 3, s. 13, and s. 14, sub-s. 2, of the

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Sale of Goods Act, 1893; *Varley* v. *Whipp* (1); *Beer* v. *Walker*. (2) In this case the herrings being found to be unfit for the food of man were rejected by Mrs. Burke. On the second point, there was clearly an exposure for sale of the herrings. In *Daly* v. *Webb* (3) meat being conveyed on a cart through the street from the slaughter-house to a place for the manufacture of preserved meats was held to have been exposed for sale. In this case the herrings were sent to Mrs. Burke for the purpose of carrying out the agreement to sell. [They also referred to *Crane* v. *Lawrence* (4) and *Wheat* v. *Brown*. (5)]

Moresby, for the respondent.

[DARLING J. The real question which we have to consider is whether there was an exposure for sale of the herrings to Mrs. Burke.]

As to that, it is first of all to be observed that there is no finding by the justices that there was an exposure for sale. Moreover, to come within that expression there must be an exposure for the purpose of procuring a sale, and clearly in this case there was no exposure of that nature. The herrings were sent to Eastbourne carriage paid in pursuance of the agreement and for the purpose of carrying out the conditional sale already effected. Further, the exposure for sale under the section must have been by the respondent or on premises under his control. In fact the herrings were exposed at the hospital by the railway company, who were not for this purpose the respondent's servants. [He referred to *Webb* v. *Baker* (6) and *Bothamley* v. *Jolly*. (7)]

On the other point I cannot successfully contend, in the circumstances, that the property in the herrings had passed to Mrs. Burke.

DARLING J. The respondent was charged under s. 117 of the Public Health Act, 1875, with having exposed for sale at Eastbourne certain herrings intended for the food of man which were unwholesome and unfit for the food of man. It appears that a Mrs. Burke, the commandant of an Eastbourne hospital, wrote to the respondent, who is a fish merchant at Hull, regarding the supply of herrings to

(1) [1900] 1 Q. B. 513.
(2) (1877) 46 L. J. (C.P.) 677.
(3) (1869) I. R. 4 C. L. 309.
(4) (1890) 25 Q. B. D. 152.
(5) [1892] 1 Q. B. 418.
(6) [1916] 2 K. B. 753.
(7) [1915] 3 K. B. 425.

the hospital. In consequence of that letter the respondent put upon the railway at Hull for delivery at Eastbourne some herrings in boxes. It is found by the justices that the herrings were not unfit for human food when handed to the railway company at Hull, but that they were unfit for human food when delivered at the hospital at Eastbourne. The justices were also of opinion that the herrings were deposited for sale at the hospital. The question we have to determine is whether the herrings were exposed for sale at Eastbourne.

By s. 1, sub-s. 2, of the Sale of Goods Act, 1893, it is provided that "a contract of sale may be absolute or conditional"; by sub-s. 3, "where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell"; and by sub-s. 4, "an agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred." In this case I think there was a conditional sale of the herrings at Hull when they were put upon the railway, but I do not think that the property in them was transferred until certain conditions were fulfilled. What were the conditions? Since the decision in *Beer* v. *Walker* (1), a case relating to the sale of rabbits, it must be taken that the herrings were sold subject to an implied condition that they should be fit for food. In that case Grove J. said this: "The case finds that what took place was in the ordinary course of business, so that there was nothing in the mode of sending the rabbits which was out of the usual course"—so with regard to the herrings in this case; they were sent by railway in the ordinary course—"and therefore the rabbits which were unfit for human food had become so in the ordinary course of transit. Then, that being so, the question is, was there an implied warranty that they should be fit for food? It cannot, I think, be contended that when a person undertakes to supply another with goods which are not specific goods, there is not an implied warranty that the goods shall be fit for the purpose for which they ordinarily would be

(1) 46 L. J. (C.P.) 677, 678.

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intended to be used, and that with regard to animals used for human food that they are fit to be so used; the case of *Bigge* v. *Parkinson* (1) is a strong authority to that effect." Applying that to the present case, this sale was subject to the implied condition that the herrings should be fit for human food, not only when they were put upon the railway at Hull, but also when in the ordinary course of transit they arrived at Eastbourne and the boxes were opened and examined by the intending purchaser within a reasonable time having regard to the fact that they contained fish. There was not a complete sale until Mrs. Burke had an opportunity of inspecting the herrings in order to see whether they were fit for human food. If they were not fit for human food Mrs. Burke was not bound to take them. That being so, this contract was not complete when the herrings were examined as they were found to be unfit for human food. Sect. 117 of the Public Health Act, 1875, says that an offence is committed if in such a case there has been an exposure of the herrings for sale. It is quite true that in this case there was not an exposure of the herrings for every part of the contract of sale, because an offer to buy them had already been made. An exposure for sale is not, however, limited to an offer to sell to all and sundry, as when a fishmonger puts fish upon a slab in his shop, which is equivalent to saying that he is willing to sell to any one who will give his price. In that case there is an exposure for all incidents of the contract of sale; but in my opinion there may be an exposure for sale which does not cover every step from the offer by the vendor to sell to the acceptance by him of the price. In this case some of these steps were taken at Hull; others remained to be taken at Eastbourne. So long as anything remained to be settled before the herrings, after being delivered at the hospital, became the property of Mrs. Burke, that is, till the agreement to sell became a completed contract of sale, there was an exposure for sale. Here there was an exposure for sale at Eastbourne to Mrs. Burke, and therefore the justices, instead of dismissing the information, ought to have convicted.

AVORY J. I agree. The charge was that the respondent was the person to whom the herrings belonged when they were exposed

(1) (1862) 7 H. & N. 955.

for sale. The two points for determination are, first, was there an exposure for sale of the herrings at Eastbourne ; and, secondly, did the herrings at that time belong to the respondent ? I agree that exposure for sale for the purposes of ss. 116 and 117 of the Public Health Act, 1875, is not to be limited to what I may call a public exposure such as that by a shopkeeper in his shop, or by a wholesale merchant in his warehouse, or by a vendor in a market. To give practical effect to the two sections an exposure for sale must include any exposure for the purpose of completing the sale. The fact that there has already been an agreement for sale or a conditional contract of sale does not prevent the exposure of the goods for the purpose of the purchaser exercising his right of inspection and rejection being an exposure for sale within s. 117. That the sale under this contract might be completed it was necessary that the herrings should be exposed at Eastbourne so that the intending purchaser might have an opportunity of inspecting them and of rejecting them if they were not fit for human food. I think, therefore, that there was an exposure for sale in this case at Eastbourne. The other question is, did the herrings at that time belong to the respondent ? In effect that has been answered by what I have already said, because, if the contract was not completed, if the purchaser had the right to inspect and reject and she did inspect and reject, the property had never passed but remained in the respondent. For these reasons I think the justices ought to have convicted the respondent.

ATKIN J. I agree. I think exposure for sale includes exposure for the purpose of completing an agreement to sell. In this case there was, in my opinion, an agreement to sell and an exposure for sale for the purpose of completing that agreement. The only other question that arises is whether or not the herrings were at the material time the property of the respondent. As to that, I think that the effect of the decision in *Beer* v. *Walker* (1) is that the condition that the goods must be merchantable means that they must be in that condition when appropriated to the contract and that they will continue so for a reasonable time. That does not necessarily mean that goods shall be merchantable on delivery

(1) 46 L. J. (C.P.) 677.

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if the vendee directs them to be sent by a long and unusual transit. It is, however, not necessary to decide that. In this case I think the property in the herrings did not pass to Mrs. Burke but remained in the respondent, who ought, therefore, to have been convicted.

Appeal allowed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for H. W. Fovargue, Town Clerk, Eastbourne.*

Solicitors for respondent: *Hart, Reade & Co., for Payne & Payne, Hull.*

J. S. H.

C. A.

1918

May 3, 6.

[IN THE COURT OF APPEAL.]

UPJOHN *v.* HITCHENS.

[1916 U. 723.]

UPJOHN *v.* FORD.

[1917 U. 6.]

Landlord and Tenant—Aircraft Risks—Covenant to insure against Loss and Damage by Fire—Policy to be effected in named Company—Usual Policy—War Risks excepted—Admissibility of Evidence—Construction of Covenant.

In a lease granted in 1905 the lessee covenanted that he would insure and keep insured the demised premises against loss and damage by fire in the names of the lessor and lessee in the Imperial Insurance Company or in some other responsible office in London or Westminster to be previously approved of in writing by the lessor. Through the agency of the lessor the premises were insured with the Alliance Assurance Company, with which the Imperial Insurance Company had become incorporated, under a policy which excepted loss or damage occasioned by or happening through "invasion, foreign enemy, ... military or usurped power." This policy was accepted by the lessor as sufficient until July, 1915, when, in consequence of enemy air raids, he required the lessee to insure the premises also against loss and damage by fire occasioned by enemy aircraft in pursuance of his covenant. The lessee refused to remedy this alleged breach, and the lessor commenced this action to recover possession:—

Held, by Warrington L.J. and Scrutton L.J., that evidence was admissible to prove that the named company and other tariff offices in London and Westminster had never insured against air-

craft risks, and that their policies had always excepted the risks above mentioned; that the covenant was to effect such a policy as was the usual policy of the companies in question at the date of the lease, or such a policy as might from time to time be usual during the currency of the lease; and that there had been no breach of that covenant by the lessee.

Held, by Pickford L.J., that there had been a breach of covenant by the lessee as his obligation was to effect an insurance against fire from all causes.

Decision of Roche J. [1918] 1 K. B. 171 affirmed.

APPEAL from the decision of Roche J.

The facts, which are summarized in the head-note, are fully stated in the report in [1918] 1 K. B. 171.

Roche J. gave judgment for the defendants, holding—(1.) that evidence was admissible to prove that the named companies had never insured against aircraft risks and that their policies had always excepted the risks above mentioned; (2.) that the covenant was to effect such a policy as was the usual policy of the companies in question at the date of the lease, or such a policy as might from time to time be usual during the currency of the lease; and (3.) that there had been no breach of the covenant by the defendants.

The plaintiff appealed.

Lewis Thomas, K.C., and *A. H. H. Richardson*, for the plaintiff. The covenant is to insure and keep insured against loss and damage by fire. That is absolute, and means insurance against fire from any cause, and the covenant is not satisfied by taking out the ordinary fire policy granted by insurance companies with the usual exception excluding liability for loss caused by invasion, foreign enemy, or military or usurped power. Evidence was wrongly admitted as to the practice of insurance companies, the words of the covenant being in themselves clear and unambiguous.

[WARRINGTON L.J. The question is whether the covenant requires an unqualified policy to be taken out, or only the usual policy issued by the designated companies.]

The covenant says nothing about usual policy. Roche J. has in effect interpolated those words, but, as Pollock C.B. said in *Gibson* v. *Small* (1), the Court cannot insert or imply a condition not

(1) (1853) 4 H. L. C. 353, 408.

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warranted by the plain meaning of the language used by the parties in the particular document. Here the parties have not contracted with reference to any practice of insurance companies, and therefore that practice cannot be imported into their contract: *Yuill & Co.* v. *Scott Robson.* (1) Further, in *Enlayde, Ld.* v. *Roberts* (2) Sargant J., in construing a similar covenant, said: "In my judgment, this evidence was not admissible, and there is nothing to show that the parties were contracting in such a way as to use those words 'loss or damage by fire' in any other than their strict and primary sense, or with any reference at all to any custom obtaining amongst all or any insurance offices." Neither the judgment of Hamilton J. in *Biddell Brothers* v. *E. Clemens Horst Co.* (3), nor that of Atkin J. in *Groom, Ld.* v. *Barber* (4), upon which Roche J. relied, has any bearing upon the present case. Moreover, even if the evidence was admissible it failed to establish that no London or Westminster insurance office would issue a policy covering loss and damage by fire caused by enemy aircraft. All that the witness said was that the Alliance Company had not issued policies covering that risk; he was unable to say whether the company had been asked to do so. If an adequate premium had been offered such a policy could no doubt have been obtained.

Colam, K.C., and *Gervais Rentoul*, for the defendants. The covenant must be read reasonably and in a business sense. Reading it in that way its requirement is satisfied by the policy in fact taken out. The evidence established that the policies issued by the Alliance Company always contain condition 4, which excludes liability for loss caused by invasion, foreign enemy, military or usurped power. It is said on behalf of the plaintiff that by reason of containing condition 4 the policy does not satisfy the covenant. The policy, however, as was pointed out by Roche J. (5), contains other conditions causing a forfeiture of benefits upon non-compliance with certain rules of conduct by the assured, so that, even apart from condition 4, insurance companies do not issue absolutely unqualified policies. This again shows that the covenant must be construed reasonably and in view of what the parties contemplated. The

(1) [1907] 1 K. B. 685; affirmed [1908] 1 K. B. 270.
(2) [1917] 1 Ch. 109, 119.
(3) [1911] 1 K. B. 214.
(4) [1915] 1 K. B. 316.
(5) [1918] 1 K. B. 179.

evidence was rightly admitted to show the meaning of the phrase "insure . . . . against loss and damage by fire."

[SCRUTTON L.J. In the case of a long lease may the practice as to insurance vary from time to time, or must it be determined as at the date of the lease ?]

The obligation would appear to be to insure according to the practice for the time being of the named office. Roche J., citing Hamilton J.'s judgment in *Biddell Brothers* v. *E. Clemens Horst Co.* (1), pointed out that in reference to a contract for the sale of goods on c.i.f. terms the seller's obligation is "to arrange for an insurance upon the terms current in the trade."

[SCRUTTON L.J. A contract on c.i.f. terms does not specify what the policy is to cover. Here the insurance is against loss and damage "by fire." It has been held, however, that "fire" within the meaning of a fire policy means fire which has broken bounds, so that damage caused by excess of fire heat in an ordinary grate is not damage by fire within the policy.]

That shows that insurance against damage "by fire" cannot be construed as covering all classes of damage by fire. If the parties desired to cover loss and damage by fire caused by enemy aircraft they should have said so in express terms. With regard to *Enlayde, Ld.* v. *Roberts* (2), the observations of Sargant J. relied upon by the plaintiff were purely obiter.

Lewis Thomas, K.C., in reply. The covenant requires the lessee to insure against loss and damage caused by any fire.

[SCRUTTON L.J. Would that include loss due to arson by the assured ?]

The policy would be against loss by any fire, but if it was due to arson the assured would be unable to recover, as he could not take advantage of his own wrong. The fact that the policy contains other conditions besides condition 4 does not alter the interpretation to be put upon the clear words of the covenant which requires an unqualified fire policy.

PICKFORD L.J. This is an appeal from a decision of Roche J., who gave judgment in favour of the defendants, who are tenants of the plaintiff. The question arises upon a covenant by the lessee

(1) [1911] 1 K. B. 214. (2) [1917] 1 Ch. 109.

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in the lease—the covenant being the same in each lease—which is in the following terms: "And also will at the like" (i.e. his own) "expense insure and keep insured all erections and buildings on the said piece or parcel of ground hereby demised against loss and damage by fire in the names of the lessor and the lessee in the Imperial Insurance Company or in some other responsible office or offices in London or Westminster to be previously approved of in writing by the lessor in the sum of 500*l.* at the least and will on demand produce to the lessor the policy or policies of assurance and the receipt for the current year's premium and other sums payable in respect thereof." The latter words about production of the policy are merely ancillary to the main covenant. The defendants effected an ordinary policy of insurance, condition 4 of which is in these terms: "This policy does not cover loss or damage occasioned by or happening through invasion, foreign enemy, ... military or usurped power," and the question has arisen whether the covenant requires the defendants to insure against loss and damage by fire caused by enemy aircraft. The plaintiff claims that he is entitled to have an insurance effected by the defendants to cover that risk; the defendants, on the other hand, say that the plaintiff is not entitled to a policy covering that risk, but is only entitled to an insurance in the form that has in fact been effected. In my opinion the question we have to decide turns mainly upon the interpretation to be put upon the covenant, but to a certain extent it turns upon the evidence that was given. I regret to say that I do not take the same view as the other members of the Court, and, as I differ from them and from Roche J., I need hardly say that I have great doubt about the correctness of my decision, but as I have formed an opinion I think it right to express it.

It has been argued on behalf of the defendants that the covenant means that a policy is to be taken out with the Imperial Insurance Company or with some other office in London or Westminster, to be approved in writing by the lessor, in the ordinary terms in which the named or approved office issues policies from time to time. It is said that if the policy is effected in the terms of the ordinary policy current at the date of the lease that is sufficient, and it matters not that the terms of the usual policy may vary during the currency of the lease. That is one view. Another view

is that the covenant means that what is required is the ordinary policy current from time to time, and, therefore, if the terms of the ordinary policy varied from year to year or from period to period during the currency of the lease, so the obligation under the covenant would vary. So also, although it does not arise in this case, if the insurance were effected, not in the Imperial Insurance Company, but in some other responsible office in London or Westminster approved by the lessor, the tenant's obligation might be different from that which would arise if the insurance had been effected with the Imperial Insurance Company, there being nothing to show that the ordinary policy of the various offices is the same. According to the argument, the policy therefore might vary from year to year according to the ordinary policy of the Imperial Insurance Company, or it might vary if the insurance were effected with some other office. I cannot think that that is the way to interpret the covenant. It cannot have been intended that the meaning of the obligation imposed by the covenant should be ascertained by an examination of the practice of the particular company or of more than one company from time to time. The covenant requires an insurance "against loss and damage by fire." Pausing there for a moment, although I do not ignore the words that follow, that seems to me to require an insurance against loss and damage by fire from all causes, not from fire from some causes, and I am not much impressed by the case which was put during the argument as to loss due to arson committed by the tenant. The policy might by its terms cover such a case, but it has been held that the tenant could not recover as he could not plead his own wrong. Nor am I impressed by the other case put where it has been held that the ordinary policy against fire does not cover damage caused by overheating from a fire in an ordinary grate. There the damage was held not to be damage by fire, but damage by heating, damage caused by an ordinary domestic fire not being covered unless it sets fire to the house. By this covenant the insurance is to be effected with the Imperial Insurance Company or with some other responsible and approved office in London or Westminster. The Imperial Insurance Company has been incorporated with, but not absorbed by, the Alliance Company. The insurance being effected with the Alliance Company, with which the Imperial Insurance Company has been

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incorporated, is an insurance with the Imperial Insurance Company, and it is unnecessary to consider whether the plaintiff would be entitled to raise the point that he had not approved in writing of this insurance with the Alliance Company, for the plaintiff does not in fact take the point. Being an insurance with the designated company, if the defendants had been able to show that they could not have effected with it a policy such as they ought to have effected against risks of fire of all kinds, I think that in all probability they would have discharged their obligation, but the evidence called on their behalf falls far short of showing that. The ordinary policy of the Imperial Insurance Company, and now of the Alliance Company, contains condition 4, which, as we know from the decision in *Drinkwater* v. *London Assurance Corporation* (1), has been in policies for considerably more than a century. It was inserted and has been kept in, no one paying any attention to it or having much occasion to consider it till recently. Whether if the tenants had asked the Alliance Company for a policy excluding that clause and covering all risks they could have got it I do not know, but the evidence fell far short of showing that they could not have obtained it. It was for the defendants to establish that they could not obtain such a policy. The evidence of the secretary of the Alliance Company was of the vaguest possible description. In examination-in-chief he was asked: "In 1905 did your company issue fire policies to insure against aircraft?" and he said "No." "Have you ever done so?" "No." In cross-examination he said he did not know whether his company had ever been asked at any time to insure against aircraft because the matter would not come before him. In answer to Roche J. he said that within his recollection the Alliance fire policies always excluded loss or damage happening through invasion, &c. Again, on being asked by the judge whether as a matter of policy his company had taken up aircraft risks, he said that they had never insured against aircraft risks or fire occasioned by aircraft risks, and that nearly all the London offices had done the same. The witness only proved that the policy actually issued was the company's ordinary policy; he knew the company did not effect policies covering risk of fire caused by enemy aircraft, but did not know whether, if they had been asked

(1) (1767) 2 Wils. 363.

and been paid an additional premium, they would not have issued a policy covering that risk. It may be that after the Government insurance scheme came into existence the company considered it better to work that scheme, but, however that may be, it was for the defendants to show, and in my opinion they failed to show, that they could not effect with the Alliance Company the policy they ought to have effected according to my interpretation of the covenant. I think, therefore, that there was a breach of covenant, but, as the other members of the Court think differently, the appeal will be dismissed.

WARRINGTON L.J., after referring to the terms of the leases and reading the covenant in question, continued: The plaintiff, who is the lessor, has in each case brought an action of ejectment, alleging that the terms have been determined by the defendants' failure to comply with the covenant to insure. The concrete question is whether the covenant is satisfied by the taking out of a policy in the ordinary form adopted by the Alliance Company (with which the Imperial Insurance Company has been incorporated), and which excludes from the risks undertaken "loss or damage occasioned by or happening through invasion, foreign enemy . . . . military or usurped power."

Before I deal with the question of construction there are one or two facts which I think should be mentioned. In each case there was subsisting at the date of the lease a policy against fire in the names of the builder and the lessor with the Alliance Company. In each case the policy was headed "Alliance Assurance Co. Limited with which is incorporated the Imperial Insurance Co. Limited." At the date of the lease the Imperial Insurance Company was no longer existing except so far as it existed in the body of the Alliance Company. I take it, therefore, that when the covenant says "insure and keep insured . . . . in the Imperial Insurance Company" that means, in reference to the facts of this case, in the Alliance Company. So far, therefore, the defendants have complied with the covenant by insuring in the office with which they were not only under an obligation to insure but had the right to insure, inasmuch as the covenant did not give the lessor a right to impose another office, but only gave him the right to approve or withhold approval

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from some other office apparently to be selected by the lessees. The primary obligation and right is to insure in the Imperial Insurance Company, now the Alliance Company.

I turn now to the covenant. It requires the defendants to insure and keep insured the premises against loss and damage by fire with the Alliance Company; I now leave out the others. The lessees are to "insure and keep insured." The word "insure" is equivalent to "shall take out a policy of insurance," because every one who enters into an obligation of this kind is perfectly well aware that the great insurance companies, of which the Alliance Company is one, insure against fire by the issue of a policy of insurance. The words "keep insured" refer to a different matter. The policy when once effected is liable to expire at the end of the year for which the first premium is paid unless it is renewed by the payment of another premium. The tenant "insures" when he takes out the policy, and he "keeps insured" by paying the premium for the succeeding year. The question now is what is meant by the words "insure and keep insured . . . . against loss and damage by fire." Does that expression mean loss and damage by fire however occasioned, or does it mean such loss and damage by fire as is provided for by a policy, meaning thereby such a policy as both the lessor and the lessee would expect to get if they made an ordinary application to the Alliance Company for a fire policy? It seems to me to mean that the lessee shall insure against such loss and damage by fire as is covered by the policy ordinarily issued by the designated office. It is true that the designated office is not the only office with which the policy can be effected, but for the purpose of construing the covenant I think that makes no difference, for I see no difficulty in saying that the covenant means an insurance against loss and damage as is covered by a policy in the form usually adopted by the office which by the process pointed out in the lease is the designated office, the one on which the parties agree. It has been suggested that the office may refuse to continue the policy in the form or subject to the same conditions as those on which it was originally issued and may require a new form of policy to be taken out. If the office refuses to continue the policy on the old terms I see no difficulty in saying that the tenant would satisfy his covenant by again insuring under the policy then adopted by the company.

The covenant does not require the tenant to do more than take out with the designated office one of those printed forms with which lessors and lessees are familiar certainly throughout the whole of London, and probably throughout the whole country. I cannot think that at the date of the lease either the lessor or the tenant contemplated for a moment that some special form of insurance would have to be adopted in order to comply with this covenant.

I take a view of the evidence rather more favourable to the defendants than that taken by Pickford L.J. The secretary of the Alliance Company in his evidence said: "We do not undertake any aircraft risks; it is the policy of the company not to undertake them," and from that I infer that if the company had been asked to issue a policy covering aircraft risks they would have refused. That is how the evidence strikes me.

I base my judgment upon the view I have expressed as to the construction of the covenant, and I think the decision of Roche J. was right and should be affirmed.

SCRUTTON L.J. It is evident from the difference of opinion in this Court that this is a case of some difficulty, and I appreciate also that it is one of some general importance, but after the best consideration I can give to the arguments addressed to us I have come to the conclusion that the decision of Roche J. was right.

The case arises in this way: the plaintiff had some land on which buildings were commenced. On September 29, 1904, while the buildings were in progress, the plaintiff and the builder took out a policy with the Alliance Company, with which is incorporated the Imperial Insurance Company, insuring the buildings against loss and damage by fire, subject to the terms and conditions indorsed thereon. One of the conditions was that the policy did not cover loss or damage occasioned by or happening through certain causes, including invasion, foreign enemy, and military or usurped power. If I am at liberty to use my own knowledge of the subject, that policy was the ordinary policy of fire insurance. If I am at liberty to look at recognized text-books, the ordinary fire policy excepts loss caused by military power. If I am at liberty to look, and I am sure I am, at what the plaintiff himself did, I find that in

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March, 1916, he wrote stating that the ordinary policy of insurance did not cover fire caused by enemy aircraft; that he had taken out in 1904 an ordinary policy of insurance on the buildings with the Alliance Company, and had let the buildings on leases containing the covenant in question, one of the leases being dated in January and the other in May, 1905; that in order that the tenants might comply with the covenant he indorsed to them the policy that he had taken out. The policy is the usual policy from Michaelmas to Michaelmas, and from Michaelmas, 1904, till Michaelmas, 1915, all parties went on, according to the argument for the plaintiff, breaking their covenant light-heartedly, it not having occurred to any one that the covenant was not complied with. Unfortunately, as we know, enemy aircraft began to come to England in September, 1915. The premium on the existing policy for the year 1915—1916 was then paid to the plaintiff as agent for the Alliance Company. The tenants were asked to insure against damage by fire caused by enemy aircraft, but they declined to do so. In September, 1916, another year's insurance having expired, the tenants again paid the premium to the lessor as agent of the Alliance Company and he accepted it, and that would ordinarily cover insurance for another year to September, 1917, but shortly afterwards the plaintiff served a notice under s. 14 of the Conveyancing and Law of Property Act, 1881, requiring the tenants to effect an insurance against loss by fire caused by enemy operations, and the tenants having declined to do so, these actions were commenced. The actions, I may say, are not concerned with the obligation on the tenants to reinstate the premises if enemy aircraft destroy them. The tenants have recognized that and have taken out policies against loss by enemy aircraft, but they did not do this in a company approved by the lessor or in the joint names. The object of these actions is to see whether there is an obligation on the tenants under this covenant to insure in the joint names of the lessor and lessee against fire caused by enemy operations. It is, however, I think admitted that no policy against loss or damage by fire would give the landlord security against every fire; for instance it would not cover a fire intentionally caused by the tenant.

Turning now to the covenant, I find that it is a covenant to effect

a contract of insurance with a third party, who is under no obligation to grant it, and to produce the policy. It seems to me that in this and in other matters where a person has covenanted to get a commercial document, evidence is admissible as to the course of business in reference to such a document and as to the kind of document the person will get from a third party who is under no obligation to grant it. Take the case where evidence of this kind is clearly admissible but which I agree is at some distance from the present case. A person sells goods c.i.f. London. There the price includes the cost of the goods, the freight to London, and the insurance of the goods. Under that contract the seller must, inter alia, obtain and hand to the buyer a policy of insurance. Evidence is clearly admissible to show what kind of policy is necessary to comply with that obligation. I take another case which is nearer the present one. An employer engages a servant with a term that he shall provide a guarantee policy from a named company against dishonesty. It is well known that companies grant policies covering loss by the dishonesty of servants with certain conditions attached to the policies. Evidence would clearly be admissible to show which kind of document is issued—what is the ordinary form issued by the guarantee company. The employer could not insist upon the servant producing a policy from the company covering every kind of dishonesty under all circumstances. Following out that line of reasoning, it seems to me that when a person undertakes to insure against loss and damage caused by fire—a phrase used in every policy against fire—and to produce the policy, evidence is admissible to show what kind of document is issued by such an insurance company. If it is the fact that a person can only obtain a policy not against every accident by fire but limited to certain cases and under certain conditions, evidence may be given as to what document was contemplated by the parties and what can be obtained. In this case the evidence on the point was not too abundant. The defendants called the secretary of the Alliance Company. He had not given a proof, and the evidence he gave was not so strong as it might have been, but I should have been more impressed by the criticism of it on behalf of the plaintiff if any evidence had been called by the plaintiff. If there is any substance in the plaintiff's case that the lessees could

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ordinarily get from a London company a policy covering loss by fire due to warlike operations it would have been easy to call evidence to that effect, and it would certainly have been simpler than relying on the point as to onus of proof. The plaintiff did not take that course, and I have a strong suspicion that he did not take it because he could not, because the ordinary policy issued by London companies does not cover loss due to warlike operations. I read the evidence given by the secretary of the Alliance Company as amounting to this: "It is the policy of our company and all tariff companies not to insure against war risks." When I know that the clause excluding loss due to foreign enemies has been in the ordinary printed form of policy for over a century, it seems to be abundantly established that the ordinary policy issued by the Alliance Company does not cover this particular kind of risk. On this ground evidence is admissible to explain what is the ordinary policy of insurance against loss and damage by fire that can be obtained from a third party, and, as the evidence satisfies me that the ordinary policy does not insure against war risks, I come to the same conclusion as Roche J. that there has been no breach of the covenant. I have the more satisfaction in arriving at that conclusion because it agrees with the practice of the plaintiff for eleven years under these two leases and agrees, I believe, with the practice of nearly every landlord in London.

I only desire to add this: Some reliance was placed by the plaintiff's counsel on the decision in *Yuill & Co.* v. *Scott Robson* (1), but that case appears to me to have no application. At Lloyd's there is a form of policy f.p.a. and another known as an "all risks policy." The policy f.p.a. insures against total loss only. In every "all risks policy" there has been inserted for years the f.c. & s. clause, so that the policy does not insure against risks due to the acts of hostile Governments. If an insurance against those risks was desired a policy against the risks excepted by the f.c. & s. clause had to be effected. There are also policies which are wider than "all risks" policies and really cover "against all risks." This practice was well known in insurance circles, and in *Yuill & Co.* v. *Scott Robson* (1) it was sought to be imported into a contract for the sale of cattle. There two people, not in the Lloyd's circle,

(1) [1907] 1 K. B. 685; affirmed [1908] 1 K. B. 270.

made a contract for the sale of cattle for shipment from Buenos Aires to Durban, the seller to insure the cattle "against all risks." The contract did not speak of an "all risks policy" or use any technical terms. It was contended, and evidence was given in support of the contention, that the contract had imported into it the insurance practice at Lloyd's as to all risks policies. The contention failed, the Court holding that this practice could not be incorporated into a contract for the sale of goods. As I have said, the case seems to have little bearing upon the question we have to determine in the present case.

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For the reasons I have given I think the appeal fails.

Appeal dismissed.

Solicitor for plaintiff: *E. J. Stokes.*

Solicitors for defendants: *Hewitt & Chapman.*

J. S. H.

[IN THE COURT OF APPEAL.]

JONES & SON *v.* WHITEHOUSE.

[1918 J. 4.]

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COLCHESTER DISTRICT REGISTRY.

Solicitor—Costs—Taxation—Bill delivered more than Twelve Months—No special Circumstances—Action on Bill—Application for Judgment under Order XIV.—Objection to reasonableness of certain Items—Right to Taxation.

Where a solicitor sues by a specially indorsed writ to recover the amount of a bill of costs, which has been delivered more than twelve months before action brought, and applies for leave to sign final judgment for the amount thereof under Order XIV., the defendant, in the absence of special circumstances entitling him to have the bill taxed under s. 37 of the Solicitors Act, 1843, is not entitled, upon showing a reasonable ground of objection to a few only of the items in the bill as being unreasonable in amount, to have the whole bill taxed, but the Court, in the exercise of its general jurisdiction, will give leave to defend as to the items objected to so as to have those items inquired into by taxation or otherwise.

In re Park (1889) 41 Ch. D. 326, applied.

APPEAL from an order made by Salter J. in chambers.

The plaintiffs were a firm of solicitors, and by a specially indorsed

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writ they brought an action to recover 64*l.* 1*s.* 3*d.*, the amount of a bill of costs for work done and professional services rendered to the defendant. The signed bill of costs was delivered to the defendant on November 27, 1916, and the writ was issued on February 13, 1918. No application to tax the bill had been made before the writ was issued. The plaintiffs took out a summons under Order XIV. for leave to sign final judgment for the amount claimed. Before the district registrar the defendant did not make an affidavit, but his solicitor asked that the bill should be referred for taxation. The district registrar refused, and gave leave to sign judgment for the amount claimed. On appeal to the judge in chambers the defendant made an affidavit in which he alleged generally that the charges in the bill were excessive and unreasonable, and he specified in particular three items, one of 10*l.* 10*s.* and two other smaller items. The judge dismissed the appeal. The defendant appealed.

G. W. Powers, for the defendant. The defendant has shown "special circumstances," and is therefore entitled to have the bill of costs taxed under s. 37 of the Solicitors Act, 1843, though twelve months have elapsed since the delivery of the bill: *In re Norman* (1); *In re Boycott* (2); *In re Cheesman* (3); *In re Robinson.* (4) The defendant has made an affidavit that the charges in the bill are excessive, and has pointed out specific items of overcharge. The order giving leave to sign final judgment for the amount of the bill is wrong. The defendant is entitled to an order to have the bill taxed under the Act, when the one-sixth rule as to the costs of taxation will apply, the plaintiffs to have leave to sign judgment for the amount so found due on taxation: *Smith* v. *Edwardes.* (5) [*In re Nicholson* (6) was also referred to.]

Even if there are no special circumstances, the defendant has shown a reasonably plausible case for inquiry and is entitled to have leave to defend and to have the whole bill taxed. Under Order XIV. the Court can only give leave to sign judgment for a definite amount: *Smith* v. *Edwardes.* (7) The judge who tries the matter

(1) (1886) 16 Q. B. D. 673.
(2) (1885) 29 Ch. D. 571.
(3) [1891] 2 Ch. 289.
(4) (1867) L. R. 3 Ex. 4.
(5) (1888) 22 Q. B. D. 10.
(6) (1861) 3 D. F. & J. 93.
(7) 22 Q. B. D. 13.

can review the charges and will only allow what is reasonable and for this purpose he can avail himself of the advice of the taxing Master: *Ex parte Ditton.* (1)

[PICKFORD L.J. referred to *In re Park.* (2)]

J. B. Matthews, K.C., and *C. E. Jones*, for the plaintiffs.

[PICKFORD L.J. The defendant has not shown any "special circumstances."]

If no application is made to tax a bill of costs within the twelve months, and no special circumstances are shown under s. 37 of the Solicitors Act, 1843, the old law applies. In former times the reasonableness of the items could not have been challenged at nisi prius, but the client was entitled to show that the charges were fraudulent or that the business was not performed: *Hooper* v. *Till* (3); *Williams* v. *Griffith* (4); *Cowdell* v. *Neale.* (5) The old common law rule may perhaps have been modified by the case of *In re Park.* (2) The question in the present case is as to the procedure to be adopted upon an application for leave to sign final judgment under Order XIV. Applying the principle of the decision in *In re Park* (2), the Court under its ordinary jurisdiction will give judgment for what is reasonable. There having been no application to tax the bill and the twelve months having elapsed, the presumption is that the charges are reasonable, and it is for the defendant to point out any items which he alleges to be unreasonable. If the defendant can point out any items which require explanation, the judge can either review those items himself or call in the assistance of the taxing Master, but the defendant is not entitled to have the whole bill taxed. Such a taxation is not a taxation under the Solicitors Act, and therefore the one-sixth rule as to costs does not apply. The defendant has not shown that any of the charges in the bill are prima facie unreasonable, and the order appealed from is right.

G. W. Powers in reply. In order to have the bill taxed it is not necessary to specify all the items objected to: *In re Dawson and Bryan.* (6) [He also referred to *Storer & Co.* v. *Johnson.* (7)]

(1) (1880) 13 Ch. D. 318.
(2) 41 Ch. D. 326.
(3) (1779) 1 Doug. 198.
(4) (1840) 6 M. & W. 32.
(5) (1856) 1 C. B. (N.S.) 332.
(6) (1860) 28 Beav. 605.
(7) (1890) 15 App. Cas. 203.

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PICKFORD L.J. This appeal raises a somewhat unusual question under Order XIV. The action is brought to recover the amount of a solicitor's bill of costs, and a summons was taken out for leave to sign final judgment under Order XIV. for the amount claimed. The bill was delivered more than twelve months before action brought. In my opinion the contention on each side is put too high. The defendant's contention comes to this, that though the client has allowed twelve months to elapse since the bill was delivered without objecting to any of the items and applying to have the bill taxed, still, even in the absence of special circumstances, if he can show a reasonably plausible objection to some of the items in the bill, he can claim to have the whole bill taxed as if he had not allowed the twelve months to elapse. I can find no authority for that contention. On the other hand the plaintiffs' contention seems to go almost to this length, that if the client has allowed the twelve months to elapse without applying for taxation, and no special circumstances are shown, the client cannot contest the reasonableness of any of the items in the bill. This contention seems to me to be contrary to the decision in *In re Park*. (1) In my opinion no special circumstances have been shown, and therefore taxation of the bill cannot be obtained under the Solicitors Act, 1843. What is the position apart from the Act? At one time it seems that the common law Courts would not have allowed an objection to the reasonableness of the items to be taken at nisi prius. That cannot be said to be the law since the decision in *In re Park*. (1) In that case a firm of solicitors carried in, in an administration action, a bill of costs, but the Court treated the matter as if an action at law had been brought upon the bill. More than twelve months had elapsed since the delivery of the bill; no special circumstances were shown, and no objection had been made to the bill and the testator had made a payment on account. Stirling J. held that the executor was not estopped from disputing any of the items and that it should be referred to the taxing Master to inquire whether any of the items which were objected to by the executor were fair and proper to be allowed and to what amount. The order was as follows (2): "That it be referred to the taxing Master to inquire and state whether any and which of the items to be marked by the

(1) 41 Ch. D. 326. (2) Ibid. 336.

plaintiff in red ink in the four several bills of costs (describing them), and which the plaintiff, the surviving executor of the said J. C. Park, shall dispute, are fair and proper to be allowed, and to what amount, respectively." The items were referred to the taxing Master as the most appropriate person to deal with them instead of the judge dealing with them himself. The Court of Appeal affirmed that decision. That case therefore decides that, although there was no right to have the bill taxed under the Act, if the client could point out any items as being extravagant, he could have those items, and those items only, inquired into. That was the order made at what was the equivalent to the trial of the action. We have to deal with the matter upon an application for leave to sign final judgment under Order XIV. It seems to me that we must deal with it on the same principle, and we are not entitled to say that if the defendant can point out items in the bill as being apparently unreasonable that is enough to entitle him to have leave to defend as to the whole bill and to have the whole bill taxed. If he can specify certain items as being extravagant, and can thus show a plausible ground of defence as to them, he can have those items, and those items only, taxed, but not the whole bill. Though there is no right to have the bill taxed under the Act, the Court may still under its general jurisdiction order any of the items to be inquired into. Coming to the facts of the present case, in my opinion the affidavit does not show a plausible ground of complaint as to any of the items. I cannot say, therefore, that the learned judge was wrong in deciding that no plausible ground of defence has been shown in respect of any of the items in the bill so as to entitle the defendant to an order to tax those items. The appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The sole question we have to decide is whether the defendant should have leave to defend. The action is brought to recover the amount of a bill of costs. The period during which the bill could have been taxed under the Solicitors Act, 1843, has expired, and no special circumstances have been shown. In the case of *In re Park* (1) the solicitor carried in a claim in an administration action on a bill of costs which had been delivered more than twelve months before, and therefore

(1) 41 Ch. D. 326.

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JONES & SON v. WHITE-HOUSE.

Warrington L.J.

the period during which the client was entitled to have the bill taxed under the Act had expired. Stirling J. and the Court of Appeal dealt with the claim as if it were an action at law and as if the Court were dealing with it at the trial. Upon that footing the learned judge held that at the trial the defendant would be allowed to question the reasonableness of the particular items in the bill which were objected to, and to have those items settled by the tribunal. In what way they should be settled in any particular case is a mere matter of convenience. In that case Stirling J. referred the items to the taxing Master and this Court affirmed his order. Acting on that decision, if the defendant had shown some reasonable and probable ground for stating that some of the items were open to objection on the ground of unreasonableness or otherwise, he would have been allowed to defend for the purpose of questioning, not the bill as a whole, but the reasonableness of those items, and to have had them taxed. On the facts here the defendant has not shown any reasonable and probable ground for contesting the reasonableness of any of the items. The appeal therefore fails.

SCRUTTON L.J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Doyle, Devonshire & Co., for Jones & Son, Colchester.*

Solicitors for defendant: *Rawson & Stevens, for F. S. Collinge, Colchester.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1918
April 18.

MITCHELL-HENRY *v.* NORWICH UNION LIFE INSURANCE SOCIETY, LIMITED.

[1917 M. 425.]

Payment—Remittance by Post—Implied Request—Registered Letter containing Treasury Notes.

The defendants sent a written notice to the plaintiff stating that a sum of 48*l.* 5*s.* 8*d.*, which would shortly become due to them from the plaintiff, should be paid at their office, and asking the plaintiff, "when remitting," to return the notice. The plaintiff sent to the defendants by registered post a packet containing 48*l.* in Treasury notes and a postal order and stamps for 5*s.* 8*d.* The packet was stolen before it reached the defendants and they never received the money:—

Held, that by the use of the word "remitting" the defendants had impliedly authorized the plaintiff to pay them by sending the money through the post in the ordinary way in which money was remitted by post, but that it was not usual to send so large a sum as 48*l.* in Treasury notes by post, and that the plaintiff had, therefore, failed to prove that he had paid his debt to the defendants.

Decision of Bailhache J. [1918] 1 K. B. 123, affirmed.

APPEAL from the judgment of Bailhache J. in an action tried without a jury. (1)

The plaintiff, who lived in London, had borrowed 400*l.* from the defendants on the security of a mortgage, repayable by half-yearly instalments of 40*l.* and interest on May 15 and November 15 in each year. On May 9, 1916, the defendants' secretary wrote to the plaintiff that the first instalment of 40*l.* and 8*l.* 5*s.* 8*d.* for interest would become due on May 15, and "I shall be obliged by your paying the amount as stated below on that day to our office at 13, Southampton Street, Holborn, W.C." The letter added: "Please return this notice when remitting." On June 13 the plaintiff posted to the defendants a letter in an ordinary envelope registered (for which he paid a registration fee of 3*d.*) containing 48*l.* in Treasury notes, and the balance in a postal order and stamps. The letter was delivered by the postman to a boy in charge of the lift in the block of buildings in which were the defendants' offices, the boy signing

(1) [1918] 1 K. B. 123.

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for the letter. The boy, who was not in the service of the defendants but of the landlord of the premises, did not deliver the letter to the defendants, and stole the money.

A short time after the loss had occurred a marginal note in the following terms was placed on the notepaper in use at some of the defendants' branch offices, including the office at 13, Southampton Street: "All cheques, money orders, and postal orders should be crossed and made payable to 'Norwich Union Life Insurance Society or order.' Cash, bank notes, and Treasury notes should be sent per prepaid registered post."

The plaintiff claimed a declaration that he had paid the instalment and interest due on May 15, 1916.

Bailhache J. held that by the use of the word "remitting" the defendants had impliedly authorized the plaintiff to pay them by sending the money through the post in the ordinary way in which money was remitted by post, but that it was not usual to send so large a sum as 48*l.* in Treasury notes by post, and that therefore the plaintiff had failed to prove that he had paid his debt to the defendants. He gave judgment for the defendants.

The plaintiff appealed.

Barrington-Ward, for the plaintiff.

H. Maddocks, for the defendants, was not called upon.

The arguments for the plaintiff were the same as in the Court below. *Thairlwall* v. *Great Northern Ry. Co.* (1) was referred to in addition to the cases there cited.

PICKFORD L.J. The question we have to determine is whether the plaintiff has made out that he has paid the instalment and interest amounting to 48*l.* 5*s.* 8*d.*, which was due on May 15, 1916. With regard to the marginal note which the defendants placed on their notepaper after the loss had occurred, it was not suggested that any such notice was known to the plaintiff when he sent the money, but we may look at it as showing that the defendants told their clients that that was the usual way to send Treasury notes. I agree with Bailhache J. that that note does not amount to an invitation or direction to their clients to send any amount of money they please in

(1) [1910] 2 K. B. 509.

Treasury notes by registered post; it is merely an intimation that where the amount is such that it is ordinarily and reasonably proper to send it by post in Treasury notes it may be sent by registered post. It becomes a question of fact in each case. I am not prepared to lay down a general rule that no sum may be sent in Treasury notes by registered post so as to amount to payment; that is to say, that it is not ordinary and proper to send some sums in that way, if it be in compliance with an invitation or direction to remit by post. On the other hand I am not prepared to lay down a rule that, even looking at the marginal note, it is ordinary and proper to send any amount, however large, in Treasury notes by registered post, and that, if it be done, the debtor has paid his debt.

The sending of Treasury notes has been compared to the sending of Bank of England notes. Bank notes, however, are much more difficult for a person like a lift boy to dispose of than 1*l.* Treasury notes. It is obvious that this is so in the case of bank notes of a large denomination; and even 5*l.* notes are not so easy to dispose of as Treasury notes. Then with regard to registration, it is common knowledge that in London, and I think in most parts of the country, the precaution is not taken, which is taken in foreign countries, when the registered letter is delivered of obtaining the signature of the person to whom it is addressed. It is well known that any one who receives a registered letter from the postman signs the receipt for it. I do not know that there was any evidence of that, but it is a fact which every business man knows. Bearing all this in mind, it does not seem to me that it is the ordinary and proper mode of paying so large a sum as 48*l.* to send it in Treasury notes by registered letter. The plaintiff might have sent a cheque, or a money order, or have paid the amount personally at the defendants' office. Taking all these matters into consideration, I do not feel inclined to differ from Bailhache J. in his finding on the facts that this sum of 48*l.* 5*s.* 8*d.* was not sent in the ordinary business and proper way of sending a sum of that amount, even under the direction or request to send it by post, and that therefore sending it by registered post in that way is not payment. The appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The defendants requested the plaintiff to send this sum of 48*l.* 5*s.* 8*d.* by post, but

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that did not amount to a request to send that sum by post in any form which the plaintiff might choose; it only amounted to a request to send that sum by post in such an ordinary way as was appropriate to a sum of that amount. The question thus becomes one of fact: Did the plaintiff send the sum in such an ordinary way as was appropriate to a sum of that amount? The onus of proving that lies upon the plaintiff. He was liable to pay the amount to the defendants, and he must show that he has paid it, though in fact the money never reached the hands of the defendants. Like Pickford L.J., I am not prepared to say that no sum may properly be sent by registered post in Treasury notes under such a request as this, but in my opinion the plaintiff has failed to make out that the ordinary way of sending so large a sum as 48*l.* is to send it in 1*l.* Treasury notes. For this reason I am not prepared to differ from the judgment of Bailhache J.

With regard to the marginal note which was subsequently, in July, 1916, placed upon the written requests for payment, it merely means that if the debtor adopts the post for sending cash of such an amount as is usually sent in cash through the post he should send it by registered letter.

SCRUTTON L.J. I agree. There was a clear request to make a remittance by post. The question seems to me, adopting the language of Lord Kenyon C.J. in *Warwicke* v. *Noakes* (1), to be whether what the plaintiff did was the usual way of transacting business of this nature. The plaintiff lived near the Haymarket and he had to pay the money at Holborn. He put 48*l.* in Treasury notes in an envelope addressed to the defendants' office in High Holborn, and registered the letter at a post office close to the Haymarket. Is that the usual way to transact business of this nature? Bailhache J. has found that it is not usual to send so large a sum as 48*l.* in Treasury notes by registered post. Using my own judgment and knowledge of what business men do, I agree that remittance by Treasury notes is not a usual way in which to send so large a sum. The judgment therefore must stand.

Appeal dismissed.

Solicitors for plaintiff: *Mount, Sterry & Wheeler.*

Solicitors for defendants: *Collisson, Prichard & Barnes.*

(1) (1791) 1 Peake, 98.

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1918
May 2

GONSKY *v.* DURRELL.

Landlord and Tenant—Distress—Privileged Goods—Value of privileged Goods left after Distress—Onus of Proof—Law of Distress Amendment Act, 1888 (51 & 52 *Vict. c.* 21), *s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 147.

In an action for wrongfully distraining a tool of the plaintiff's trade in contravention of s. 4 of the Law of Distress Amendment Act, 1888, the onus lies upon the plaintiff to prove that 5*l.* worth of wearing apparel, bedding, and tools and implements of his trade was not left by the distrainor upon the premises as required by s. 147 of the County Courts Act, 1888. The common law protection cannot be relied upon in an action framed only on the statute.

Decision of the Divisional Court [1918] 1 K. B. 104 affirmed.

APPEAL from the judgment of a Divisional Court. (1)

The plaintiff, a tailor's presser, was tenant to the defendant of a house in the Mile End Road at a weekly rent of 13*s.* On November 21, 1916, the rent being in arrear to the amount of 4*l.* 13*s.*, the defendant caused a distress to be put in. The bailiff who levied the distress seized a sewing-machine. The plaintiff brought this action in the county court, claiming that the sewing-machine, being a tool or implement of his trade, had been wrongfully distrained "in contravention of s. 4 of the Law of Distress Amendment Act, 1888." (2) At the trial the county court judge, who tried the

(1) [1918] 1 K. B. 104.

(2) By s. 4 of the Law of Distress Amendment Act, 1888, "The following goods and chattels shall be exempt from distress for rent; namely, any goods or chattels of the tenant or his family which would be protected from seizure in execution under s. 96 of the County Courts Act, 1846, or any enactment amending or substituted for the same."

By s. 147 of the County Courts Act, 1888 (which is substituted for s. 96 of the Act of 1846), "Every bailiff or officer executing any process of execution issuing out of the court against the goods and chattels of any person may by virtue thereof seize and take any of the goods and chattels of such person (excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of 5*l.*, which shall to that extent be protected from such seizure). . . . ."

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case with a jury, at the close of the plaintiff's case entered judgment for the defendant upon the ground that the plaintiff had failed to give evidence that the defendant did not leave 5*l.* worth of wearing apparel and bedding on the premises after levying the distress (the evidence being that there was no other tool or implement of trade on the premises).

The Divisional Court held that, the action being based upon s. 4 of the Law of Distress Amendment Act, 1888, and s. 147 of the County Courts Act, 1888, the onus lay upon the plaintiff to prove that 5*l.* worth of wearing apparel, bedding and tools and implements of trade was not left by the distrainor upon the premises, and that therefore the decision of the county court judge was right.

The plaintiff appealed.

H. S. Q. Henriques, for the plaintiff. The onus of proving that wearing apparel and bedding of the plaintiff or his family and the tools and implements of his trade to the value of 5*l.* have been left on the premises was upon the defendant. In an action at common law for distraining a tool of trade the onus is on the landlord of proving that there was no other sufficient distress on the premises: *Nargett* v. *Nias* (1); Bullen on Distress, 2nd ed., p. 235, citing *Dawson* v. *Alford*. (2) The plaintiff applied to the county court judge to amend the particulars of claim by adding a claim at common law, but the judge refused.

Next, under s. 147 of the County Courts Act, 1888, the defendant had to leave 5*l.* worth of wearing apparel and bedding of the plaintiff or his family and also 5*l.* worth of the tools and implements of his trade. The evidence showed that the sewing-machine was the only tool or implement of trade upon the premises. There are two classes of goods mentioned in the action, and 5*l.* value of each class must be left. The decision of Channell J. in *Boyd, Ld.* v. *Bilham* (3), that the protection of the section is limited to goods of the kind mentioned therein of the total value of 5*l.* is wrong and should be overruled. In s. 21, sub-s. 2, of the Summary Jurisdiction Act, 1879, and s. 38 of the Bankruptcy Act, 1914, similar protection

(1) (1859 1 E. & E. 439 447. (2) (1572) Dyer, 312a.
(3) [1909] 1 K. B. 14.

is given in clear words. [*Churchward* v. *Johnson* (1) was also cited.]

[PICKFORD L.J. This point was not taken in the county court, and cannot be taken here.]

G. W. H. Jones, for the defendant, was not called upon.

PICKFORD L.J. This case depends entirely upon technicalities. I doubt whether the merits of the case have been tried, but we cannot express an opinion upon any point which has not been taken in the county court. The action is brought to recover damages for wrongful distress, and the particulars of claim allege that "the defendant wrongfully distrained on the plaintiff's goods at 470, Mile End Road, Stepney, by distraining on a Singer sewing-machine in contravention of s. 4 of the Law of Distress Amendment Act, 1888." Therefore the action is brought on the Act and on the Act alone. The evidence showed that the machine was in good going order when distrained upon, and it does not appear from the evidence that there was any other tool of trade on the premises. It does not appear that any other goods were distrained upon, nor was there any evidence as to what was left on the premises. There was no evidence that less than 5*l.* of privileged goods was left. There was no evidence therefore as to whether 5*l.* worth of wearing apparel and bedding of the plaintiff or his family was left upon the premises. The county court judge was asked to amend by allowing a claim for wrongful distress at common law, but he refused, and as it was a matter within his discretion we cannot interfere. I think it would have been better if he had allowed the amendment so as to have the case fully tried. Personally I think that an amendment ought always to be allowed so as to have the case fully tried out, unless some injustice would be caused thereby. In the Divisional Court the only question raised was as to the onus of proof. A further point was sought to be raised here, namely, that the 5*l.* value specified in s. 147 of the County Courts Act, 1888, is to be read distributively, that is to say, that the exception extends to wearing apparel and bedding of the value of 5*l.* and to tools and implements of trade of the value of 5*l.* If it had been desired to raise that point here it ought to have been taken in the county

(1) (1889) 54 J. P. 326.

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court. The point was not taken in the county court, and therefore we cannot entertain it. I express no opinion upon it. I will only say that it is contrary to the judgment of Channell J. in *Boyd, Ld.* v. *Bilham.* (1)

There remains only one question: Were the county court judge and the Divisional Court right in holding that the onus was on the plaintiff to prove that wearing apparel and bedding and tools and implements of trade to the value of 5*l.* were not left on the premises? Sect. 147 of the County Courts Act, 1888, after allowing the bailiff to seize and take "any of the goods and chattels of such person," proceeds to enact an exception—"excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of 5*l.*, which shall to that extent be protected from such seizure." Therefore wearing apparel and bedding and tools and implements of trade to the value of 5*l.* are protected, and unless the plaintiff proves that the distress has infringed the protection by showing that 5*l.* worth of those goods has not been left, he has not proved that the distress is wrongful. The plaintiff has to prove that the person distraining has distrained upon the 5*l.* value of protected goods, and unless he proves that he has no cause of action. The plaintiff gave no evidence that the defendant had not left 5*l.* worth of the protected articles and the county court judge stopped the case at the close of the plaintiff's case. I doubt if I should have stopped the case, but the judge was entitled to do so. Counsel for the defendant took the point. I agree with the Divisional Court that the onus of proving that 5*l.* in value of the protected articles was not left upon the premises was on the plaintiff, and he gave no evidence of it. The appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The plaintiff by bringing this action seeks to establish that the defendant when distraining has seized an article which is exempted from distress by s. 4 of the Law of Distress Amendment Act, 1888. It is for the plaintiff to prove his cause of action, that is, a seizure of something which is exempt from distress under the Act. Sect. 4 of that Act exempts from distress certain goods, "namely, any goods or chattels of the tenant or his family which would be protected from seizure

(1) [1909] 1 K. B. 14.

in execution under s. 96 of the County Courts Act, 1846, or any enactment amending or substituted for the same." Sect. 147 of the County Courts Act, 1888, has been substituted for s. 96 of the Act of 1846, and it provides as follows: [The Lord Justice read the section.] Therefore the wearing apparel and bedding of the plaintiff or his family and the tools and implements of his trade to the value of 5*l.* are to that extent protected from distress. I assume that the law laid down in *Boyd, Ld.* v. *Bilham* (1) is correct, namely, that the limit of 5*l.* extends to all the goods specified in the exception in s. 147 as one class. The defendant did not take any goods of the class exempted from distress unless he failed to leave on the premises goods of that class to the value of 5*l.* If he left goods of that class worth 5*l.* the goods taken were not exempt from distress. The plaintiff has to prove that the goods seized were exempt, and in order to do that he must prove that 5*l.* worth of goods of that class was not left. The onus therefore lay on the plaintiff. He gave no evidence of the value of the goods of that class left on the premises. The decision of the Divisional Court was right, and the appeal must be dismissed.

SCRUTTON L.J. I agree. I share the regret that the merits of this case have not been dealt with owing to the course taken at the trial. A sewing-machine may be a tool or implement of a man's trade. There are three ways in which a sewing-machine as a tool of trade may be exempt from distress. First, if it is in actual use; secondly, if there is other sufficient distress on the premises; and, thirdly, under s. 4 of the Law of Distress Amendment Act, 1888. The two first are common law exemptions; the last is statutory. In this case the action is brought for wrongful distress by reason of a breach of the statutory exemption, and not by reason of a breach of the common law protection. The plaintiff has to prove his case, and therefore has to prove that the sewing-machine comes within the exemption enacted by s. 4 of the Law of Distress Amendment Act, 1888. That section makes the exemption from execution enacted by s. 147 of the County Courts Act, 1888, applicable to a distress for rent. Sect. 147 provides that "any of the goods and chattels" of the person may be seized, "excepting the

(1) [1909] 1 K. B. 14.

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wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of 5*l.*, which shall to that extent be protected from such seizure." The plaintiff to bring himself within the exception has to prove, not only that a tool of his trade has been seized, but also that wearing apparel and bedding of the plaintiff or his family and tools and implements of his trade to the value of 5*l.* have not been left on the premises. The onus under this enactment of proving that is on the plaintiff. The other point which was taken in this Court for the first time is that the decision in *Boyd, Ld.* v. *Bilham* (1) was wrong. That case decides that the value of 5*l.* applies to all the goods mentioned in the exception, and that therefore it is sufficient to leave 5*l.* worth of those goods on the premises. The point that the words in s. 147 "to the value of 5*l.*" are to be read distributively was not taken in the county court, and consequently it is not open to the plaintiff to take it here. That was decided by the House of Lords in *Smith* v. *Baker & Sons* (2), and we acted upon this rule recently in the case of *Sales Agency* v. *Elite Theatres.* (3) The only point open to the plaintiff is whether, when a tool of trade is seized, the onus is on him to prove that wearing apparel and bedding and tools and implements of trade of the total value of 5*l.* were not left on the premises, and as I have said, in my opinion the onus is on the plaintiff. The county court judge was therefore technically right.

I desire to add for myself that as at present advised I do not agree with the opinion expressed in the Divisional Court that the same rule does not apply at common law. My present opinion is that the same rule applies. No doubt in *Nargett* v. *Nias* (4) Lord Campbell C.J., in delivering the judgment of the Court, said that "it is not necessary for the plaintiff in his declaration to allege that there were other goods of sufficient value which might have been distrained; but the defendant must show in his answer, when he justifies, that no other sufficient distress could be found." I desire to reserve my decision as to whether the view of Lord Campbell is correct; and I notice that so eminent a lawyer as Mr. Blackburn, afterwards Lord

(1) [1909] 1 K. B. 14.
(2) [1891] A. C. 325.
(3) [1917] 2 K. B. 164.
(4) 1 E. & E. 447.

Blackburn, during his argument in that case said (1) in reference to *Dawson* v. *Alford* (2) that "that was a special action on the statute, as prescribed by Fitzherbert in the note just cited; and the case shews that the allegation 'against the form of the statute'" (which was in the count for distraining beasts of the plough) "may be taken to include an allegation that there was other sufficient distress." I incline to think that view is correct, and I say so with the less hesitation because I find that in Bullen and Leake on Pleading, 3rd ed., pp. 317, 318, in a count for distraining beasts of the plough the plaintiff is made to allege that there were then on the land other goods of the plaintiff liable to the distress and sufficient to satisfy the arrears of rent and charges. Therefore I do not accept without hearing further argument the position that at common law the decision in this case would have been different. I too regret that an amendment was not made by the county court judge in the particulars allowing this point to be raised. I agree that the appeal should be dismissed.

PICKFORD L.J. Scrutton L.J. has discussed the question whether the Divisional Court were right in the opinion they expressed that at common law the onus of proof would be different. I desire to express no opinion on the point.

WARRINGTON L.J. Nor do I express any opinion upon it.

Appeal dismissed.

Solicitor for plaintiff: *G. Vandamm.*
Solicitors for defendant: *Forbes & Son.*

(1) 1 E. & E. 443. (2) Dyer, 312a.

W. F. B.

1918
March 4, 25.

MUNRO, BRICE & CO. *v.* WAR RISKS ASSOCIATION, LIMITED, AND OTHERS.

[1917 M. 1441.]

Insurance (Marine)—Perils of the Sea—"Free of capture and seizure" Clause—Proximate Cause of Loss unascertained—Burden of Proof.

In an action on a policy insuring against loss by perils of the sea with a clause excepting loss by capture, seizure, and consequences of hostilities, it is not necessary for a plaintiff whose ship has been lost at sea to prove that it was not lost by the excepted causes.

Green v. *Brown* (1744) 2 Str. 1199 followed.

In an action on a policy insuring a ship against loss by capture, seizure, and consequences of hostilities, the plaintiff fails if on the evidence the probabilities are equally in favour of a loss by the perils insured against and a loss by other perils.

Rules for determining the incidence of the burden of proof in actions upon policies of insurance containing exceptions from liability.

Gorman v. *Hand-in-Hand Insurance Co.* (1877) I. R. 11 C. L. 224 and *Hurst* v. *Evans* [1917] 1 K. B. 352 considered.

TRIAL of action before Bailhache J. without a jury.

The plaintiffs, the owners of the sailing ship *Inveramsay*, by a policy of marine insurance dated January 20, 1917, insured the vessel with the War Risks Association, Limited, the first named defendants, for a sum of 5460*l.* from January 1, 1917, to January 1, 1918, against risks of capture, seizure, and detention by the King's enemies and all consequences of hostilities or warlike operations by or against the King's enemies.

By a policy of marine insurance dated January 26, 1917, the plaintiffs insured the vessel with the Anchor Marine Mutual Underwriting Association, Limited, the secondly named defendants, for the sum of 1500*l.* from January 1, 1917, to January 1, 1918, against perils of the seas "warranted free from capture, seizure, and detention, and the consequences thereof, or any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations whether before or after declaration of war."

On or about March 21, 1917, the *Inveramsay* left Gulf Port for Fleetwood laden with timber. Since that date nothing had been

heard of her. The plaintiffs alleged that she was lost by perils insured against by the secondly named defendants (hereinafter called the marine risks underwriters), or, in the alternative, by the perils insured against by the first named defendants (hereinafter called the war risks underwriters). They claimed a declaration that she was so lost and judgment for the amount insured by those defendants who should be found liable.

The following statement of the facts is taken from the written judgment of the learned judge :—

"In this case the plaintiffs, the owners of the sailing vessel *Inveramsay*, sue two sets of underwriters in order to recover from one or the other of them in respect of the loss of the vessel at sea. The marine risks underwriters are sued upon a policy dated January 26, 1917, covering perils of the sea in the usual form and containing, as is also usual, the warranted 'free of capture and seizure clause. The war risks underwriters are sued upon a policy dated January 20, 1917, against risks excluded from the marine policy by the free of capture and seizure clause.

"So far as the *Inveramsay* is concerned all that is known of her is that she left Gulf Port bound for Fleetwood with a cargo of timber on March 21, 1917; she was not overloaded; she carried a deck cargo; and she has never since been heard of. It is conceded that she has sunk at sea. The normal length of such a voyage as she was upon for a sailing ship is forty days, sometimes prolonged to sixty days, but rarely longer.

"Three extraneous facts are also known: One, that submarines were active off the Irish coast for a distance of 250 to 300 miles, and that a number of timber carrying ships which left Gulf Port on a similar voyage were sunk by submarines. It is perhaps inadvisable to give the precise figures, although they were proved in evidence and I have them in mind.

"Another fact proved from meteorological charts prepared from log-books and from actual log-books of vessels sailing on similar voyages is the weather likely to have been met with by the *Inveramsay* on her voyage. From the meteorological charts it appears that there was no wind above force 9, which indicates a strong gale, in any locality in which the *Inveramsay* was likely to be, and that only on a few occasions and for short periods, and I am informed by

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seamen of experience that there is nothing in the recorded weather to account for the foundering of a well-found ship as the *Inveramsay* appears to have been. One of these witnesses, arguing from the meteorological charts, thought there would not have been heavy seas, a view which is not borne out by the log of the *Ancenis*. On the other hand, it is impossible to say with any degree of certainty what the actual course of a sailing vessel is upon a voyage of that length, and the log of the *Olivebank*, which left Gulf Port on March 17, records a strong gale with squalls on April 9, and a freshening gale, whole gale, and strong gale, the two latter accompanied with heavy squalls, on April 12, 13, and 14. The *Ancenis*, which left Mobile on March 18 and proceeded to sea on March 25, met with an easterly storm on the 30th, and made very heavy weather of it on April 4 and 5 and from the 6th to the 10th of that month. The sea especially seems to have been running very high, and it must be remembered that the *Inveramsay* carried a deck cargo.

"The third fact is that in nearly all the cases in which timber vessels were torpedoed off the Irish coast the fact seems to have been definitely known. This of itself would not be of great moment, as I know from experience in this Court that vessels may be sunk by submarines near the coast without any positive evidence of the fact being procurable. It has, however, a bearing upon the problem presented by this case."

Greer, K.C., and *Greaves Lord*, for the plaintiffs.

Leck, K.C., *MacKinnon, K.C.*, and *H. Maxwell*, for the war risks underwriters.

R. A. Wright, K.C., and *Simey*, for the marine risks underwriters.

[The arguments of counsel sufficiently appear from the judgment.]

Cur. adv. vult.

March 25. BAILHACHE J. (after stating the facts). In order that the plaintiffs should succeed upon the war risks policy, which is a policy against loss due to specific causes, I have to be satisfied beyond reasonable doubt that the *Inveramsay* was torpedoed. There is no suggestion that she struck a mine or, if that is a possibility, no suggestion that she did so outside the danger area in which

submarines were active. The difficulty in the case is to get the *Inveramsay* within the danger area. If that difficulty were overcome I should have no hesitation in finding that she was there sunk by a war peril although nothing is definitely known. Ought I then to be satisfied that she did reach the danger area in safety? Most sailing vessels undoubtedly do so, and I must bear the evidence of the experienced masters in mind. As against this there are sea perils besides the force of the winds and waves. The known weather was at times bad and the seas high. The *Ancenis* was, I gather, for a time in some danger. The course of the *Inveramsay* cannot be laid with anything like precision. She carried a deck cargo which, though not unduly large, was an added source of danger. There were gales and heavy squalls. Taking all these factors into account, and remembering the length of the voyage, and bearing in mind that in nearly all the cases of vessels torpedoed off the Irish coast the fact was definitely ascertained, I am unable to say that the probabilities of the torpedoing of the *Inveramsay* are so great that I ought to hold as a matter of fact that she was torpedoed. I think she may have been, but I cannot say she was. Equally I cannot say she was not.

The result is that the action upon the war risks policy fails.

What is the result so far as the marine risks underwriters are concerned? I have on two former occasions expressed the opinion that in cases of this sort, where all that can be proved is that a vessel is lost at sea, no one knows how, the loss falls upon the marine policy. The assured having proved that his vessel foundered at sea has proved a loss by a peril of the sea, for in the last resort every vessel that sinks at sea is lost by a peril of the sea. The loss is then within the terms of the promise and the question is, Must the assured go further and show that the sea peril was not induced by a cause excepted by the free of capture and seizure clause? If so, an assured, as in this case, being insured by two policies, one against marine and the other against war risks, may fail on both; on the latter because he cannot show that the loss was due to a war risk, on the former because he cannot show that it was not. The free of capture and seizure clause is an exception clause, and my view was expressed without referring to the authorities, upon what I understand to be the ordinary principles applicable to contracts

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containing promises qualified by exceptions. This opinion of mine has, I find, been doubted by Roche J. in *Compania Maritima of Barcelona* v. *Wishart*. (1) It has been challenged by the marine underwriters in this case, and the point has been fully argued and the authorities cited. In these circumstances, and having regard to the large sums of money involved in these disputes and their frequent occurrence, I have reconsidered the matter and looked into the cases, with what result I will now state.

Great stress was laid upon a passage in the 3rd edition of Bullen and Leake on Pleading (2) dealing with actions upon marine insurance policies. The passage reads thus: "Care must be taken to state the contract accurately, with all the exceptions and qualifications of the defendants' liability (*Dawson* v. *Wrench* (3)), and the declaration must negative that the defendant comes within the exceptions. (Ib.; but see *Wheeler* v. *Bavidge* (4); *Crow* v. *Falk* (5)." It was suggested that the learned authors intend that not only must the exceptions be negatived but that the plaintiff must prove the negative. I think that is a misunderstanding.

In this passage it is to be observed that the authors rely upon *Dawson* v. *Wrench* (3), but refer to two cases as seeming to point the other way—*Wheeler* v. *Bavidge* (4) and *Crow* v. *Falk*. (5) *Dawson* v. *Wrench* (3) was an action in which the plaintiff sued to recover a particular average loss upon a policy containing the 3 per cent. franchise, and in his declaration had set out the sum claimed but had not averred that it exceeded the franchise. On demurrer the Court held the declaration was bad and that the averment was necessary. That case was, if I may respectfully say so, rightly decided, and if demurrers were in vogue would, I think, be so decided to-day, for reasons which will be given hereafter, but it does not, I think, for the same reasons support the wide general statement that all exceptions in a marine policy must be set out and negatived, still less that the plaintiff must prove the negative. The passage, even when understood as dealing with the form of the declaration and not with the burden of proof, is inconsistent with another passage on p. 60 of the same book, which I will read presently. *Crow* v. *Falk* (5) is not very

(1) (1918) 34 Times L. R. 251.
(2) (1868) p. 182.
(3) (1849) 3 Ex. 359.
(4) (1854) 9 Ex. 668.
(5) (1846) 8 Q. B. 467.

instructive, but the case of *Wheeler* v. *Bavidge* (1) is interesting as showing that what is now settled law was then arguable. That was an action by charterers against shipowners for failing to make six successive voyages with their ship. The declaration set out the charterparty fully, including a clause containing a number of the usual exceptions. The declaration did not contain an averment negativing the exceptions, and it was held on demurrer that the declaration was good, and that if the defendant relied upon the exceptions he must plead them. This decision is entirely in accord with modern practice and, as I shall hope to show, is not in conflict with *Dawson* v. *Wrench*. (2)

The passage on p. 60 dealing with the general rules applicable to contracts with exceptions is in these terms: "If the covenant or clause in an agreement is absolute in itself, without any exception or proviso or any reference to any, it may be declared on as an absolute contract, although in a distinct part of the deed or instrument there is a proviso defeating or qualifying it under certain circumstances; such a proviso is in the nature of a defeasance and must be set up, if the facts permit it, by the other side. Sometimes the covenant or clause, although it does not contain the exception or proviso, refers to it by such words as 'except as hereinafter excepted,' and in this case the exception or proviso must be stated in the declaration, for verba relata inesse videntur." There seems at one time to have been a distinction between a proviso and an exception, but this distinction was regarded as early as 1823 as too subtle even for the acute minds of those days—see *Latham* v. *Rutley* (3)—and I gather that by 1868, at any rate, it had fallen into disrepute. What strikes one about this statement of the rules of pleading is its artificial character. One would think that the duty of the plaintiff to set up and negative exceptions ought to depend upon the construction of the contract as a whole, taking the promise and exceptions together, and not upon the relative positions in the contract of the promise and the exceptions. Again, the rule as stated does not seem to be reliable, for if so, the free of capture and seizure exception and the particular average franchise clause, which is in the nature of an exception, need not be set out and negatived, and yet we find

(1) 9 Ex. 668. (2) 3 Ex. 359.
(3) (1823) 2 B. & C. 20.

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it stated on p. 182 that they must be so treated, and as to the particular average franchise there is the express decision of *Dawson* v. *Wrench* (1) to that effect. I have looked at a great many relevant declarations, and I find that the practice was to set out policies almost at full length, including the exceptions, and to negative those at any rate that bore upon the nature of the particular action. To mention only one instance, it was so done in the well-known case of *Ionides* v. *Universal Marine Insurance Co.* (2) The alternative possible practice of stating the legal effect of the contract without setting it out seems hardly ever to have been followed. The reason, no doubt, was the risk that unless the legal effect was stated with precise accuracy there might be a variance between the effect so stated and the contract as proved. If that happened the action failed, although the contract as proved would have supported the claim if the contract sued upon had been set out in full: see *Latham* v. *Rutley.* (3) This was a risk few pleaders would run, and it may be that the common practice of setting out the contract in full with all its exceptions led to the practice of negativing the exceptions as a matter of precaution and whether it was necessary to do so or not. The practice of negativing exceptions, even when the whole contract was set out in the declaration, was not universal, at any rate, after the Common Law Procedure Act, 1852, as appears from the declaration in *Powell* v. *Hyde.* (4) In that case a British ship was fired at and sunk by a Russian fort. The policy was against the usual perils, with the free of capture and seizure clause. The declaration set out the policy including the clause and averred that the vessel was by the accidents and certain of the perils insured against sunk and foundered and the goods lost to the plaintiff. The declaration did not negative the exceptions, and I find that in giving judgment one of the judges, Wightman J., said: "The declaration here does not state the precise nature of the peril causing the loss, as would have been necessary under the former rules of pleading" (no doubt a reference to the alterations made by the Common Law Procedure Act, 1852). The case is interesting, because if ever there was a case in which one

(1) 3 Ex. 359.
(2) (1863) 14 C. B. (N.S.) 259.
(3) 2 B. & C. 20.
(4) (1855) 5 E. & B. 607, 611.

would think it necessary to negative the free of capture and seizure exceptions, that would seem to be the case.

I noticed in looking at the forms of declaration for actions for loss or damage to goods during carriage by sea that of the three given two refer in general terms to the bill of lading exceptions and negative them, while one does not. It was, of course, at all times the practice for the defendant to set up in his plea any exceptions upon which he relied. Upon the whole I have come to the conclusion that before the Judicature Acts it was considered the safer course to set out the exceptions and to negative them in the declaration, and that, too, whether they were contained in a separate clause or not. Some bolder spirits seem to have omitted them after the Act of 1852, and I doubt whether it was necessary to refer to them after that Act and the decision in *Wheeler* v. *Bavidge* (1), except in such cases as *Dawson* v. *Wrench*. (2)

It by no means follows that because the practice was to negative exceptions in the declaration the plaintiff thereby undertook the burden of proving the negative. It is difficult to suppose that in an action for damage to cargo a shipper of goods under a bill of lading containing the common exceptions of act of God, King's enemies, and perils of the seas, called witnesses to prove that none of these exceptions became operative; while to turn to a different class of case—namely, libel upon a person—the declaration always alleged that the publication was false and malicious, yet I think no plaintiff, at any rate since the beginning of the last century, was called upon to prove either of these adjectives.

When one turns from the old form of pleading to the modern, the change is striking. A form of statement of claim on a policy of marine insurance is given. It is quite short. The terms of the policy are not set out, still less are the exceptions. If a total loss is claimed all one need say is "loss total"; while it is noteworthy that if a particular average loss is claimed and the policy contains the 3 per cent. franchise, it is necessary to say "loss partial, exceeding 3 per cent." These forms are, I think, in accordance with the law as laid down in both the decisions of *Dawson* v. *Wrench* (2) and *Wheeler* v. *Bavidge*. (1) I may further remark that when the form for total loss is used no particulars will be ordered of how the peril

(1) 9 Ex. 668. (2) 3 Ex. 359.

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relied on arose. A plaintiff who alleges that his vessel was lost by a peril of the sea or by sinking cannot be ordered to state how the sinking came about. These forms were prepared at a time when the older rules of pleading were well known and when it was desired to simplify them. The fact that the form for a total loss does not make any provision for setting out or negativing exceptions, and merely describes the loss as due to a peril insured against, would seem to show that its framers, while stating the facts necessary to be proved, intended to limit the form strictly to these facts and discarded unnecessary averments, while the form for a particular average loss shows that the framers well knew what averments were necessary. If the question under discussion is to be decided upon forms of pleading, I have come to the conclusion that the free of capture and seizure exception need not be set out and need not be negatived.

I now turn to consider a few decisions upon the burden of proof in a case like the present. The only authority I have found upon the question in the precise form in which it presents itself in this case is *Green* v. *Brown*. (1) The case was decided in 1744 by Lee C.J., but it arose in 1739, when we were at war with Spain. I will read the whole report. It is very short. "The ship *Charming Peggy* was insured in 1739, from North Carolina to London, with a warranty against captures and seizures. And in an action the loss was laid to be by sinking at sea. All the evidence given was, that she sailed out of port on her intended voyage, and has never since been heard of. And several witnesses proved, that in such a case the presumption is that she foundered at sea, all other sort of losses being generally heard of. The underwriter insisted, that as captures and seizures were excepted, it lay upon the assured to prove the loss happened in the particular manner declared on. But the Chief Justice said, it would be unreasonable to expect certain evidence of such a loss, as where everybody on board is presumed to be drowned; and all that can be required is the best proof the nature of the case admits of, which the plaintiff has given; he therefore left it to the jury, who found the loss according to the plaintiff's declaration." (2)

(1) 2 Stra. 1199.

(2) To this there is a note "*Newby* v. *Read*. Sit. after Mich. 3 Geo. 3. S. P. Park on Marine Insurance, 63"—3rd ed. (1842) p. 148—"quod vide."

An analogous question came before the Irish Courts in 1877, in *Gorman* v. *Hand-in-Hand Insurance Co.* (1) The action was upon a fire insurance policy, and Palles C.B. thus deals with the matter: "The policy is not in its terms limited to damage by accidental fire: 'the society agrees (subject to the conditions indorsed, which are to be taken as part of the policy), that if the property described shall be destroyed or damaged by fire . . . . they will . . . . pay or make good all such loss and damage.' The third indorsed condition provides that the policy shall not cover, inter alia, loss or damage caused by the act of an incendiary; and reading this condition, as we are bound to do, as part of the policy, the contract is that the defendants shall be liable for loss by fire, provided it be not the act of an incendiary. When, therefore, it is once shown that the loss resulted from fire, the plaintiff has established a prima facie case, and the onus is thrown upon the defendants to prove that the act which caused the fire was within the proviso. The defence is not in any sense a traverse of an allegation comprised within the general averments of the plaint; it is a plea in confession and avoidance, and the proof of it is upon the defendants." I will only give the reference to *The Glendarroch* (2), but the case is well worth reading.

The last case to which I need refer is a recent decision of Lush J., *Hurst* v. *Evans*. (3) That was an action upon a policy against loss or damage to jewellery from any cause whatever save and except loss by theft or dishonesty of any servant in the exclusive employment of the assured. Lush J. held that it was incumbent upon the assured to prove a theft by some person other than a servant in his exclusive employment. This judgment and that of Palles C.B. (1) are in conflict unless the distinction is to be found in the fact that in the case before Palles C.B. the exception was contained in a separate clause while in the case before Lush J. the promise and the exception are in the same clause, a distinction upon which, as already stated, I am not inclined to rely. I own it would not have occurred to me, had I been advising the plaintiff on evidence in *Hurst* v. *Evans* (3), to advise that he must call all his servants and put them into the witness-box one after the other to deny that he or

(1) I. R. 11 C. L. 224, 230. (2) [1894] P. 226.
(3) [1917] 1 K. B. 352.

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she stole the jewels. The procession would be a long one if Messrs. Whiteley were the plaintiffs. With all respect I venture to prefer the decision of Palles C.B.

This review of the authorities confirms me in my view that, as the law now stands, when in an action upon a policy of marine insurance the assured has proved that his ship was sunk at sea, he has made out a prima facie case against his underwriters on that policy, and that it is for them to set up the free of capture and seizure exception and to bring themselves within it if they can. The rules now applicable for determining the burden of proof in such a case as the present may, I think, be stated thus :—

1. The plaintiff must prove such facts as bring him prima facie within the terms of the promise.

2. When the promise is qualified by exceptions, the question whether the plaintiff need prove facts which negative their application does not depend upon whether the exceptions are to be found in a separate clause or not. The question depends upon an entirely different consideration, namely, whether the exception is as wide as the promise, and thus qualifies the whole of the promise, or whether it merely excludes from the operation of the promise particular classes of cases which but for the exception would fall within it, leaving some part of the general scope of the promise unqualified. If so, it is sufficient for the plaintiff to bring himself prima facie within the terms of the promise, leaving it to the defendant to prove that, although prima facie within its terms, the plaintiff's case is in fact within the excluded exceptional class. Illustrations of this rule are actions against common carriers and the analogous cases in which a promisor undertakes to perform a given act unless excused by certain excepted events, as, for example, a vendor to deliver, strikes excepted ; a charterer to load a ship in a given number of lay days, subject to the usual exceptions now found in charter-parties.

3. When a promise is qualified by an exception which covers the whole scope of the promise, a plaintiff cannot make out a prima facie case unless he brings himself within the promise as qualified. There is ex hypothesi no unqualified part of the promise for the sole of his foot to stand upon. As an instance I take a marine policy with the particular average franchise. There, reading the promise

and the exception together, the promise is not a promise to pay particular average or to pay particular average except in certain events. It is a promise to pay particular average exceeding 3 per cent. To bring himself within that promise a plaintiff must show more than a particular average loss; he must show a particular average loss exceeding 3 per cent. This is the explanation, I think, of *Dawson* v. *Wrench* (1), and why that case is no authority for the wide general statement on p. 182 of Bullen and Leake on Pleading (2), and why that case does not conflict with *Wheeler* v. *Bavidge* (3) or with my suggested rule 2.

4. Whether a promise is a promise with exceptions or whether it is a qualified promise is in every case a question of construction of the instrument as a whole: see per Palles C.B. in *Gorman* v. *Hand-in-Hand Insurance Co.* (4)

5. In construing a contract with exceptions it must be borne in mind that a promise with exceptions can generally be turned by an alteration of phraseology into a qualified promise. The form in which the contract is expressed is therefore material.

Applying these rules to the present case, I adhere to the opinion I have expressed in former cases and give judgment against the marine underwriters with costs.

I should add that I have not forgotten that the particular average franchise exception generally contains an exception to itself, namely, unless stranded. I have not referred to this fact, as it has no bearing upon the matters under discussion.

Judgment for first named defendants. Judgment for plaintiffs against secondly named defendants.

Solicitors for plaintiffs: *Pritchard, Englefield & Co., for Simpson, North, Hurley & Co., Liverpool.*

Solicitors for War Risks Association: *G. G. H. Walker & Tree, for Weightman, Pedder & Co., Liverpool.*

Solicitors for Anchor Marine Mutual Underwriting Association: *William A. Crump & Son.*

(1) 3 Ex. 359.
(2) 3rd ed. (1868).
(3) 9 Ex. 668.
(4) I. R. 11 C. L. 224.

W. H. G.

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COLDINGHAM PARISH COUNCIL *v.* SMITH.

Father and Child—Liability of Father for Maintenance of Aduli Son—Son maintained as Pauper Lunatic in Scotland—Father domiciled in England.

A pauper, of the age of twenty-four years, was found destitute in the parish of D. in Scotland. That parish relieved him and, under s. 71 of the Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83), claimed and received repayment of the cost of that relief from the plaintiffs, the authorities of a Scottish parish in which the pauper had a legal settlement. Subsequently the pauper was found destitute and insane in the parish of A., also in Scotland. That parish, having caused him to be examined and certified as a lunatic and removed to an asylum, recovered repayment of the expenses of so doing from the plaintiffs under s. 76 of the Lunacy (Scotland) Act, 1857 (20 & 21 Vict. c. 71). The plaintiffs thenceforward paid for the maintenance of the lunatic in the asylum under s. 77 of the last-mentioned Act. The lunatic was the son of a domiciled Englishman. On the death of the father leaving assets the plaintiffs claimed to recover from the defendants as his executors the sums which they had respectively paid to the parishes of D. and A., and the expenses of the lunatic's maintenance in the asylum, as being money which they had been compelled to pay and which the father had been legally compellable to pay.

By s. 71 of the Poor Law (Scotland) Act, 1845, a parish relieving a pauper may recover the cost of relief "from his parents or other persons who may be legally bound to maintain him." By the common law of Scotland a parent is legally bound to provide his children up to any age with the necessary means of subsistence.

It is assumed in ss. 77 and 78 of the Lunacy (Scotland) Act, 1857, though not directly enacted, that the expense of the examination, removal, and maintenance of a lunatic may be recovered from the lunatic's relations:—

Held, that, even assuming that the said statutes applied to a parent or relation who was a domiciled Englishman, and that the latter statute conferred a right on the parish of settlement to recover from a relation where legally liable apart from that statute, the liability of the parent or relation must be determined by the law of his domicil; that by English law a father is not liable for the maintenance of his adult son in the absence of an order of justices under the statute of 43 Eliz.; and that the defendants were consequently under no liability to the plaintiffs.

TRIAL of action before Salter J.

The action was brought to recover a sum of 524*l.* 18*s.* 1*d.* as money

expended by the parish council of Coldingham, in the county of Berwick in Scotland, on behalf of one John Hood Bailey, a pauper lunatic having a settlement in the parish, the defendants being the executors of the pauper lunatic's father.

The following statement of the facts is taken from the judgment of the learned judge :—

In this case the plaintiffs, the council of a parish in Scotland, have incurred expenses in the care and maintenance of a pauper lunatic settled in the parish, and they claim repayment by the executors of the will of the pauper's father, a domiciled Englishman. The statement of claim alleges that the defendants' testator was liable to repay these expenses, but gives no grounds for this allegation. The testator, Daniel Bailey, was an Englishman by birth and was at all times domiciled and resident in England. In 1870 he was sent by his employers to Coldingham in Scotland to superintend the execution of certain work which they had undertaken there. While staying in Coldingham for this purpose he married Thomasina Hood Dougall, who lived in the parish. On the completion of the work he returned with his wife to his home in England. Very shortly afterwards they separated, and never lived together again. The wife returned to her former home in Coldingham and lived there for many years. John Hood Bailey, the child of the marriage, was born there in July, 1871. He spent his boyhood in the parish, living with his mother, and at the age of fifteen or sixteen he was apprenticed to a solicitor in the neighbourhood. While serving his articles he continued to live with his mother in Coldingham. Later he appears to have taken to agricultural labour, and up to the time when he became insane he was employed on farms in Coldingham and the district, and lived sometimes with his mother and sometimes on the farms where he was working. In March, 1896, being then in his twenty-fifth year, he was found destitute in the parish of Dunbar. That parish relieved him, and claimed repayment from the plaintiffs, as the parish of settlement, under s. 71 of the Poor Law (Scotland) Act, 1845 (8 & 9 Vict. c. 83), and the plaintiffs duly made repayment. On April 2, 1896, he was found in the parish of Athelstaneford destitute and insane. The poor law authority of that parish caused him to be duly examined and certified under s. 14 of the Lunacy (Scotland) Act, 1862 (25 & 26

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Vict. c. 54), and to be removed to the Haddington Asylum and there maintained. They claimed repayment from the plaintiffs, as the parish of settlement, under s. 76 of the Lunacy (Scotland) Act, 1857 (20 & 21 Vict. c. 71), and the plaintiffs duly made repayment. On May 9, 1896, the plaintiffs caused the pauper to be removed from the Haddington Asylum to the Roxburgh District Asylum. He has ever since been, and now is, an inmate of that asylum, and the plaintiffs have paid to the superintendent the expenses of his care and maintenance under s. 77 of the Lunacy (Scotland) Act, 1857. All the expenditure of which repayment is now claimed was proper and reasonable in amount. The plaintiffs received certain sums from the mother for which credit is given, and the amount now claimed is the balance of their expenditure. In 1897 correspondence passed between the plaintiffs' agent and the testator's solicitors. The plaintiffs claimed that the testator should pay, or contribute to, his son's maintenance. The testator denied all liability, and made it clear that he would never voluntarily make any payment. The plaintiffs threatened proceedings, but none were taken. Daniel Bailey had at all times sufficient means to repay the plaintiffs their expenditure. He died in 1915. The defendants are the executors of the will and admit assets. John Hood Bailey had acquired a settlement in the parish of Coldingham before March, 1896. By the common law of Scotland a father is bound to provide his children with the necessary means of subsistence up to any age if they are unable to maintain themselves.

Edwardes Jones, for the plaintiffs. The defendants' testator, Daniel Bailey, was liable under s. 71 of the Poor Law (Scotland) Act, 1845 (1), to reimburse the plaintiffs their expenditure upon the lunatic by reason of the fact that the lunatic was a pauper. He had been recognized by the plaintiff parish as a pauper chargeable to them before he became a lunatic, and he did not cease to be a pauper because he afterwards became insane. The order made by the sheriff under s. 14 of the Lunacy (Scotland) Act, 1862, under which he was removed to the Haddington Asylum, described him as "labourer and pauper." Sect. 71 enables the parish relieving a pauper to recover the expenses of relief from the pauper's "parents,"

(1) See note (1), p. 98, post.

and that section must equally apply whether the parent is domiciled in Scotland or in any other part of the United Kingdom. The fact that Daniel Bailey was domiciled in England did not prevent him from being subject to the operation of the Scotch Act. In *Reg.* v. *Jameson* (1) Lord Russell of Killowen C.J. said: "It may be said generally that the area within which a statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the statute. But there may be suggested some general rules—for instance, if there be nothing which points to a contrary intention, the statute will be taken to apply only to the United Kingdom. But whether it be confined in its operation to the United Kingdom, or whether, as is the case here, it be applied to the whole of the Queen's dominions, it will be taken to apply to all the persons in the United Kingdom or in the Queen's dominions, as the case may be." The word "parents" in the section in question is not qualified by the words "who may be legally bound to maintain him," for in Scotland parents are always legally bound to maintain their children. The words "who may be legally bound to maintain him" must be read only with the immediately preceding words "other persons." For otherwise the words "his parents or other" might be struck out of the section as surplusage. And not only are the plaintiffs entitled under s. 71 to recover from the defendants the cost of the pauper's relief in the parish of Dunbar, but also the cost of his maintenance in the asylums. By s. 75 of the Lunacy (Scotland) Act, 1857 (2), a pauper lunatic while detained in an asylum is to be deemed to be residing in and to be chargeable to the parish of his settlement. The effect of that is that the lunatic while detained in the Haddington Asylum was to be treated as being "found destitute" in the parish of Coldingham within the meaning of s. 71 of the Poor Law (Scotland) Act, 1845. But if the plaintiffs are not entitled to recover the expenses of maintenance in the asylum under that section, they are so entitled by virtue of ss. 77 and 78 of the Lunacy (Scotland) Act, 1857. Those sections recognize that if the lunatic has no means his "relations" shall be liable for his maintenance, and that the superintendent of the asylum or other parties incurring the expenditure may have recourse over against the relations. The word "relations" in those sections,

(1) [1896] 2 Q. B. 425, 430. (2) See note (2), p. 98, post.

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like the word " parents " in the Poor Law Act, must be read without any qualification as to domicil, and include relations resident in England. There being then a liability on the defendants according to Scotch law, the English Court has jurisdiction to enforce it, the general rule being that the Court has jurisdiction to try all actions in personam arising abroad except such as come within one of the recognized exceptions, such as actions relating to the title to foreign land, or actions for the recovery of taxes or penalties imposed for local purposes by a foreign State. For the reason above given it is unnecessary to consider whether by English law a father is liable to maintain his adult son who is unable to maintain himself, but if it is necessary it is contended that in fact he is so liable. The statute of Elizabeth under which justices may make an order on a father to support his children presupposes an existing liability, and only provides a manner of enforcing it. In *Bazeley* v. *Forder* (1) Blackburn J. seems to have assumed that the obligation was a legal as well as a moral one, for he assented to the proposition that " a father's legal obligation to support his child is not more than to supply such food and clothing as are necessary for health." Further, in addition to the cause of action against the defendants arising on the Scottish statutes, there was an implied contract on their testator's part to reimburse the plaintiffs arising from the fact that the plaintiffs had been compelled to pay money which the said testator had been legally compellable to pay.

C. Herbert Smith, for the defendants. The action will not lie against the defendants. As their testator, Daniel Bailey, was at all times a domiciled Englishman his liability to maintain his son must be determined according to English law, and by that law there is no liability on a father to maintain his son of full age except where an order of justices has been made under the 43 Eliz. c. 2. " It is now well established," said Cockburn C.J. in *Bazeley* v. *Forder* (2), " that, except under the operation of the poor law, there is no obligation on the part of the father to maintain his child, unless, indeed, the neglect to do so should bring the case within the criminal law. Civilly there is no such obligation." And further, even where it is sought to make him liable under the statute of Elizabeth, the order of justices must have been

(1) (1868) L. R. 3 Q. B. 559, 564. (2) Ibid. 565.

obtained against him in his lifetime. Otherwise there is no remedy against his estate. In *Rawlins* v. *Goldfrap* (1) Sir Pepper Arden M.R. said: "If the father had thought fit, he might, I am afraid, by the law of this country leave his children upon the parish. I am surprised that should be the law of any country, but I am afraid it is the law of this: and I have taken occasion before to say so. Not even the parish in such a case can come against the executor." These considerations exclude the suggested liability of the defendants under s. 71 of the Poor Law (Scotland) Act, 1845, for recourse for reimbursement to the parish can only be had against the "persons who may be legally bound to maintain him." But, further, in any event no action could be founded upon that section for the recovery of the expenses incurred in the asylums. The lunacy law and the poor law are quite distinct, and there is no foundation for the contention that the expense of maintaining a lunatic in an asylum can be recovered under the Poor Law Act. It must be recovered, if at all, under ss. 75—78 of the Lunacy (Scotland) Act, 1857, and those sections do not apparently give any right of recourse against the relations.

Edwardes Jones in reply.

Cur. adv. vult.

1918. March 27. SALTER J. delivered a written judgment. After stating the facts as above set out he proceeded as follows:— I propose to consider first whether the plaintiffs could have maintained this claim, or any part of it, against the testator in his lifetime. The claim may be conveniently divided into two parts— (1.) repayment of the sum paid to Dunbar under the Poor Law (Scotland) Act, 1845, and (2.) repayment of the sums paid to Athelstaneford and to the superintendent of the Roxburgh Asylum under ss. 76 and 77 of the Lunacy (Scotland) Act, 1857. I will deal first with the claim to repayment of the sum paid to Dunbar. This claim, if valid, must either be based on some statute or on the common law. The only statute relied on as directly supporting this claim is the Poor Law (Scotland) Act, 1845, s. 71. This section gives a right of recovery to the relieving parish, but it gives no direct or express right of recovery to the parish of settlement. I

(1) (1800) 5 Ves. 440, 444.

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have therefore to consider whether the plaintiffs make good this part of their claim at common law. In my opinion it is impossible to imply in fact any promise by the testator to repay either the parish of Dunbar or the plaintiffs. Nor, in my opinion, can any promise be implied in law. In *Urmston* v. *Newcomen* (1) it was suggested, but not decided, that a promise to pay for necessaries would be implied by law where a father has deserted a legitimate child unable to maintain himself. But even if this proposition be law, I think there was no desertion such as would justify its application in this case. A promise, however, would be implied by law if the plaintiffs were compelled to pay to Dunbar that which Dunbar could have legally recovered against the testator. Such promise would be implied by English (and also, I understand, by Scottish) law, and would be valid by the law of both countries. It was contended that the plaintiffs could recover on this ground. They certainly were compelled to pay Dunbar. The question, therefore, is whether Dunbar could have recovered against the testator. The Poor Law (Scotland) Act, 1845, s. 71, enables the relieving parish to recover from the settlement parish of the pauper (if such parish be in Scotland) " or from his parents or other persons who may be legally bound to maintain him." These words must be read together, and they define a class of persons who are under a legal obligation to maintain the pauper apart from this statute. I think the reference is probably confined to those relatives of the pauper who are liable to aliment him by the common law of Scotland. I think that the liability of a father to maintain his son must be determined by the law of the father's domicil, and the testator is therefore not within the class. But this statute binds the testator unless a contrary intention appears: *Reg.* v. *Jameson* (2); and I will assume that the words include any person who is under any legal liability, outside this statute, to maintain the pauper. If so, the question is whether the testator was under any legal liability to maintain his son. In my opinion he was not. Apart from contract, a father is under no liability by English law to maintain his adult son, even when the son is unable to maintain himself, except the liability imposed by the statute of Elizabeth

(1) (1836) 4 Ad. & E. 899. (2) [1896] 2 Q. B. 425, 430.

(43 Eliz. c. 2), s. 6: *Mortimore* v. *Wright* (1); *Shelton* v. *Springett* (2); *Bazeley* v. *Forder*. (3) The statute provides, under a money penalty, that certain relatives of a pauper shall relieve and maintain him "in that manner and according to that rate" as shall be assessed by the justices. In my opinion the assessment and order of the justices not merely define the extent of the liability but are a condition precedent to the existence of any legal liability at all. In this case no order was ever made. I think, therefore, that the parish of Dunbar could not have recovered from the testator under s. 71 as a person legally bound to maintain the pauper; nor could they recover as having been compelled to pay for the pauper that which the testator could have been compelled to pay; nor had the pauper any legal right against his father which they could have enforced. For these reasons I hold that the plaintiffs had no legal right, either by statute or at common law, to recover from the testator the moneys they paid to the parish of Dunbar.

It remains to consider the claim to repayment of the sums paid to Athelstaneford and to the Roxburgh District Asylum. The payment to Athelstaneford was made under s. 76, and the payments to the asylum were made under s. 77 of the Lunacy (Scotland) Act, 1857. It was contended that these sections gave the plaintiffs a statutory cause of action against the testator. Sect. 76 certainly gives no direct or express right to the parish of settlement to recover over against the relatives. Sect. 77 is not so clear. The Scottish experts were not agreed whether the parish of settlement can recover from the relatives by the Scottish law in the case of lunacy, and it is not necessary to decide the point. I think that the liability of relatives which is clearly recognized in s. 78, and possibly in s. 77 (but is not imposed by either section), is probably confined to the liability imposed on relatives by the common law of Scotland. But if s. 77 be construed in the most favourable manner possible to the plaintiffs, it provides that the plaintiffs could sue the testator if he was legally liable, apart from this statute, to defray the expenses of his son's examination, removal, and maintenance as a lunatic. I think such liability must be determined by English law,

(1) (1840) 6 M. & W. 482. (2) (1851) 11 C. B. 452.
(3) L. R. 3 Q. B. 559, 565.

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and that, for the reasons I have given in dealing with Dunbar, the testator was under no such liability. The plaintiffs had therefore no statutory cause of action against the testator for this portion of their claim. Nor, in my opinion, had they any cause of action at common law. No contract can be implied in fact. None can be implied by law on the ground of desertion. None can be implied by law on the ground that the plaintiffs had been compelled to pay Athelstaneford and the asylum that which those authorities could have recovered from the testator. They could not have recovered against him under any statute, nor had the pauper lunatic any legal right against his father which they could enforce.

For these reasons I think that the plaintiffs had no cause of action against the testator to recover any part of the sums claimed, and it therefore becomes unnecessary to consider the alternative defences raised to the whole or portions of the claim. I reach this conclusion with regret, because the plaintiffs' claim is a meritorious one. It is, however, in my opinion, unfounded in law. The action must therefore be dismissed with costs.

Judgment for defendants.

Solicitors for plaintiffs: *A. F. & R. W. Tweedie.*

Solicitors for defendants: *Sharpe, Pritchard & Co., for W. J. S. & J. A. S. Scott, Newcastle-on-Tyne.*

Notes.

(1) By s. 71 of the Poor Law (Scotland) Act, 1845, "Where in any case relief shall be afforded to a poor person found destitute in a parish or combination, it shall be lawful for the parochial board of such parish or combination to recover the monies expended in behalf of such poor person from any parish or combination within Scotland to which he may ultimately be found to belong, or from his parents or other persons who may be legally bound to maintain him."

(2) By s. 75 of the Lunacy (Scotland) Act, 1857, "Every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly; and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic."

Sect. 76: "All the expenses attending the taking and sending a pauper lunatic to any district asylum in or from any parish which is not the parish of the settlement of such lunatic, including the sum paid for the order for admission of such lunatic, and the maintenance of such lunatic therein, shall be recoverable by the party or parish defraying such expense from the parish of the settlement of such lunatic. . . . ."

Sect. 77: "The expense incurred by any superintendent of any asylum, or by any other party, for or in relation to the examination, removal, and maintenance of any lunatic, shall be defrayed out of the estate of such lunatic, or if such lunatic has no adequate estate, and if such expense shall not be borne by the relations of such lunatic, then the lunatic shall be treated as a pauper lunatic, and such expense shall be defrayed by the parish of the settlement of such lunatic, and the superintendent or other party disbursing such expense shall be entitled to recover the same from or out of the parties or estate liable to defray the same as aforesaid."

Sect. 78: "If the parish of the settlement of any such pauper lunatic cannot be ascertained, and if the lunatic has no means of defraying the expense of his maintenance, nor any relations who can be made liable for the same, the expenses attending the taking and sending such lunatic, and of his maintenance in the district asylum, shall be defrayed by the parish in and from which he was taken and sent, but with recourse, nevertheless, to such parish, at any time when it shall appear that such expenses are legally chargeable to any other party or parish, against such party or parish. . . . ."

J. F. C.

1918
April 23.

MELLES & CO. *v.* HOLME.

Landlord and Tenant—Demise of Portion of a House—Covenant by Landlord to keep in tenantable Condition—Defective Condition of Premises—Damage to Tenant—Want of Notice to Landlord of Defective Condition—Liability of Landlord.

The rule that a landlord who has covenanted with his tenant to keep the premises in tenantable condition is not liable for damage caused to the tenant by the condition of the premises becoming defective unless he had express notice of it has no application to a case in which he demises only a portion of the premises and retains in his own control the portion the defective condition of which causes the damage.

Appeal from Liverpool County Court.

By a lease dated June 24, 1915, the defendants, who were the owners of a house in Wood Street, Liverpool, demised the front rooms on the first and second floors of the house for a term of seven years to the plaintiffs, who carried on business as dealers in artificial flowers, feathers, and millinery goods. The plaintiffs covenanted that they would use the demised rooms "only as store or show rooms for the safe keeping exhibition and sale of goods dealt in by them in their business," and the defendants covenanted that they would during the term "keep the outside of the demised premises and the roof and walls and drains thereof other than those within the demised rooms in good and tenantable condition." The top floor was let by the defendants to one Collinson, a bootmaker, and there was access to the roof from his premises. On the roof was a parapet wall, and between the parapet and the sloping roof was a gutter for carrying off the rainwater. The defendants retained in their own hands the control of the roof. The downflow pipe from the gutter became choked, whereby the rainwater rose in the gutter, flowed down through the roof into the plaintiffs' premises, and damaged their goods. Inside the pipe which was stopped up were found, in addition to a small quantity of ashes, a piece of felt sock from the inside of a boot, some string, pieces of leather, and a cork lining; and it was suggested that these latter things had been thrown into the gutter by Collinson's workmen. The plaintiffs sued the defen-

dants in the county court for breach of their covenant to keep the roof in good and tenantable condition. The defendants had received no notice of the defective condition of the gutter previously to the occurrence of the damage complained of. They had caused the roof to be inspected once a quarter. The county court judge found that, apart from the block caused by the intrusion of foreign matter, the gutters were in good and tenantable condition, and that there had been no want of care on the part of the defendants. He held that if the blocking of the gutter amounted to a want of tenantable condition within the meaning of the covenant notice to the lessors of the defective condition was necessary, and in the absence of such notice he gave judgment for the defendants. The plaintiffs appealed.

McCall, K.C., and *Kyffin*, for the plaintiffs. The finding of the county court judge that the defendants had not been guilty of negligence is immaterial; their duty to keep the premises in a safe condition was absolute. In *Hart* v. *Rogers* (1) landlords let to a tenant a flat on the top floor of a building, themselves retaining possession and control of the roof. Owing to frost the asphalt covering of the roof became cracked, and without any negligence on their part water found its way through the cracks into the flat and did damage. It was held that the landlords were liable. In that case there was no covenant to repair, and the liability of the defendants was rested on a duty arising out of the relation between the parties. A fortiori must the obligation be absolute when, as in the present case, there is an express covenant to keep the roof in "good and tenantable condition." That expression covers more then "repair"; it is not limited to the condition of the structure, which was admittedly not out of repair, and, under the circumstances of the case, extends to the necessity of providing against the presence of foreign matter in the gutter. The extent of the covenant must be measured by the intention of the parties at the time of the demise and the purpose for which the rooms were let. Both parties contemplated the premises being used as storerooms for a particularly delicate class of goods which would necessarily be injured by damp, and the defendants must be understood

(1) [1916] 1 K. B. 646.

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as having undertaken the obligation of preventing injury from that cause. With reference to the absence of notice to the defendants of the stoppage of the pipe, which was one of the grounds upon which the judgment of the Court below proceeded, it is contended that the rule requiring notice as a condition of the lessor's liability under a covenant to repair is limited to cases in which the whole of the house is let. "That rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair": per Collins M.R., *Tredway* v. *Machin*. (1) It has no application to a case where, as here, the landlord keeps in his own possession and control the portion of the premises the defective condition of which causes the damage.

Hanbury Aggs, for the defendants. The county court judge was right in holding that absence of notice to the defendants of the stoppage of the gutter was a good answer to the action. A covenant by a lessor to repair is to be construed as a covenant to repair on notice: *Makin* v. *Watkinson* (2); *Torrens* v. *Walker* (3); and there can be no breach of such a covenant until the lessor has notice of want of repair. That rule applies equally whether the lessor lets the whole premises or only a part. In *Manchester Bonded Warehouse Co.* v. *Carr* (4) the owners of a warehouse let certain floors of it to a tenant and covenanted to keep the walls and roof in good and substantial repair and condition. It was held that, in the absence of notice to them of any damage or want of repair, they were not liable for any breach of their covenant. But, even if notice was not necessary in the present case, there was no breach of the covenant, for there was no evidence that the premises were not in a tenantable condition. The foreign matter which caused the stoppage of the pipe was evidently thrown into the gutter by the workmen of the tenant of the top floor, and for their act the defendants cannot be held responsible. The presence of that foreign matter did not cause the roof to be otherwise than in a tenantable condition. It was no more a condition of the roof than

(1) (1904) 91 L. T. 310, 311.
(2) (1870) L. R. 6 Ex. 25.
(3) [1906] 2 Ch. 166.
(4) (1880) 5 C. P. D. 507.

the presence of a pail carelessly left by third persons on a staircase could be said to be part of the condition of the staircase; and in such circumstances a lessor who had covenanted to keep the staircase in good condition could not be held liable on the covenant to a tenant who had suffered personal injuries from falling over the pail.

McCall, K.C., in reply.

SALTER J. This is an action for breach of a covenant to repair, and alternatively for damage caused by the defendants' negligence. The defendants by a lease dated June 24, 1915, let certain rooms on the first and second floors in a house belonging to them to the plaintiffs, while other parts of the house were let to other tenants, and in particular the top floor was let to a bootmaker of the name of Collinson. The lease contained a covenant by the lessors that they would "during the said term at their own cost keep the outside of the said demised premises and the roof walls and drains thereof other than those within the demised rooms in good and tenantable condition." The roof, including the gutter and downflow waterpipe by which the rainwater was carried off from the roof, had been in perfectly good repair, the lessors having caused it to be inspected by a competent person every three months; but somehow one of the pipes carrying the water away from the roof became choked about two feet from the top. There was evidence that the stoppage was partly due to ashes which had been discharged from neighbouring chimneys and fallen upon the roof, but it was mainly due to refuse of bootmaking materials, and the inference was that that refuse had been thrown into the gutter by Collinson's workmen. The downflow of the water being stopped, it rose in the gutter, came through the roof, and found its way down into the plaintiffs' rooms, where it damaged their goods. The plaintiffs were carrying on the business of dealers in artificial flowers, feathers, and millinery goods, and they covenanted to use the demised rooms only as store and show rooms for the purposes of that business. It was therefore in the contemplation of both parties that the rooms were going to be used for that purpose. On these facts the action was brought to recover the damage done. The judge gave judgment for the defendants. He found that the damage was caused by the gutter

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becoming blocked, but that, apart from the block caused by the intrusion of foreign matter, the gutters were in good condition. He also found that there was no want of care in the defendants, and that they had no notice of the blocking of the gutter which caused the damage. He held that notice to the landlords of the block, if indeed it amounted to a want of tenantable condition within the meaning of the lease, was necessary to give a right of action. In my view that judgment cannot be supported. I think the matter turns on the express terms of the covenant. It is not necessary to determine whether there also exists an implied covenant to maintain the roof in any particular condition. If such an implied covenant exists, its terms cannot be wider than those of the express covenant. It is said that the plaintiffs cannot enforce that covenant because they gave no notice of the breach. In some cases no doubt there must be read into a covenant by a landlord to repair a condition that the tenant must give him notice of the want of repair before he can be entitled to complain of it. The principle of that rule is thus laid down by Bramwell B. in *Makin* v. *Watkinson* (1): "When a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary." This was also put very clearly by Collins M.R. in *Tredway* v. *Machin* (2): "That rule rests upon the principle that the landlord is not the occupier of the premises, and has no means of knowing what is the condition of the premises unless he is told, because he has no right of access to the demised premises, whereas the occupier has the best means of knowing of any want of repair." To justify the Court in reading into a covenant a condition which is not there, there must be very strong ground for their doing so. Here there are no such grounds. The roof was in the possession and control of the defendants, not of the plaintiffs. Therefore there is no justification for saying that they cannot enforce the covenant in the absence of notice. It only remains to consider whether there was a breach of the covenant to maintain the roof in a good and tenantable condition. Whether the obstruction of the downflow pipe amounted to a breach of the covenant depends upon what was the intention of the parties. When considering that one must bear in mind the purpose of the lease

(1) L. R. 6 Ex. 25, 30. (2) 91 L. T. 310.

and the consequent necessity of keeping the demised rooms free from damp. It must have been contemplated by the defendants that their obligation under the covenant included the scouring of the gutter and the keeping the passage of the downflow pipe at all times free. The defendants having failed to do that were in my opinion guilty of a breach of the covenant, and the judgment should have been for the plaintiffs for the amount of the damages which were found by the judge.

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ROCHE J. I agree and have nothing to add.

Appeal allowed.

Solicitors for plaintiffs: *Howard & Shelton.*
Solicitor for defendants: *J. H. Glover, Liverpool.*

J. F. C.

BIRMINGHAM AND MIDLAND MOTOR OMNIBUS COMPANY, APPELLANTS *v.* THOMPSON, RESPONDENT.

1918
April 18.

Hackney Carriage—Omnibus—Plying for Hire—Standing in private Yard—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *ss.* 38, 45 —*Town Police Clauses Act*, 1889 (52 & 53 *Vict. c.* 14), *ss.* 2, 3, 4.

The effect of the Town Police Clauses Act, 1889, which brings omnibuses within the provisions of the Town Police Clauses Act, 1847, relating to hackney carriages, is that omnibuses are required to have a licence when plying for hire at any place "within the prescribed distance," whether in a public street or not.

CASE stated by justices of Walsall.

An information was laid by the respondent against the appellant company charging that they being the proprietors of an omnibus permitted the same to be used as a hackney carriage standing and plying for hire within the borough of Walsall without having obtained a licence as required by the Town Police Clauses Acts, 1847 and 1889.

By s. 37 of the Town Police Clauses Act, 1847, "The Commissioners may from time to time license to ply for hire within the prescribed distance . . . . such number of hackney coaches or carriages . . . . as they think fit."

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Sect. 38: Every wheeled carriage . . . . used in standing or plying for hire in any street within the prescribed distance . . . . shall be deemed to be a hackney carriage within the meaning of this Act; . . . . provided always that no stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares . . . . shall be deemed to be a hackney carriage within the meaning of this Act."

Sect. 45: "If the proprietor . . . . of any carriage . . . . permits the same to be used as a hackney carriage plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage . . . . such person so offending shall for every such offence be liable to a penalty not exceeding 40s."

By s. 2 of the Town Police Clauses Act, 1889, that Act is to be construed as one with the Act of 1847.

Sect. 3: "The term 'omnibus' where used in this Act shall include every omnibus . . . . stage coach and other carriage plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed distance; but shall not include . . . . any carriage starting from and previously hired for the particular passengers thereby carried at any livery stable yard (within the prescribed distance) whereat horses are stabled and carriages let for hire, the said carriage starting from the said stable yard . . . . and not standing or plying for hire within the prescribed distance."

Sect. 4, sub-s. 1: "The several terms 'hackney carriages' . . . . and 'carriage' whenever used in sections 37, 40 to 52" (of the Act of 1847) "shall notwithstanding anything contained in s. 38 of that Act, be deemed to include every omnibus."

The corporation of the borough of Walsall are the urban authority for the urban district of Walsall under the Public Health Act, 1875, and as such are the licensing authority in respect of hackney carriages, including omnibuses, under the Town Police Clauses Acts, 1847 and 1889, and have the powers and duties in respect thereof formerly vested in the Commissioners under the Act of 1847. Sect. 171 of the Public Health Act, 1875, defines the expression "within the prescribed distance" in the Act of 1847 as meaning, for the purposes of the Public Health Act, "within any urban district."

At the hearing of the information the following facts were proved:—

(*a*) Prior to June 30, 1917, the appellant company had been running a motor omnibus service between New Street in the city of Birmingham and Walsall under licences issued by the city of Birmingham and the Perry Barr Urban District Council and with the consent of the borough of Walsall. Since June 30, 1917, the appellants have continued running a twenty minutes' service on weekdays and a thirty minutes' service on Sundays between the said places.

(*b*) In the month of May, 1917, the corporation of Walsall gave notice to the appellants that they refused to consent to their running motor omnibuses within the borough after June 30, 1917.

(*c*) Before that date not only did the said omnibuses when coming from Birmingham set down their passengers in the public streets in Walsall, but they also when commencing the return journey to Birmingham started from a certain spot in a public street in Walsall called Leicester Street.

(*d*) On and after July 1, 1917, the appellants' motor omnibuses continued to run between Walsall and Birmingham without any licence or consent in respect thereof having been given or issued by the Walsall Corporation. The omnibuses from Birmingham to Walsall set down their passengers anywhere in the public streets in Walsall. When the passengers had dismounted the omnibuses proceeded to a garage called Darwall garage, pulled inside the garage yard, and turned round to be ready for the return journey to Birmingham. Passengers were required to enter the omnibuses while standing in the yard, and all fares had to be collected and tickets punched before they left the yard. When time was up the omnibuses travelled as far as the Walsall borough boundary without stopping, and no passengers were picked up after leaving the yard until that boundary was passed.

(*e*) The Darwall garage and garage yard were private property and within the urban district of Walsall.

(*f*) Shortly before June 30, 1917, the appellants gave notice by placard posted at various places in the town that the motor omnibuses for Birmingham would in future start from the Darwall garage. On some of the placards was printed the figure of a hand pointing in the direction of the garage yard.

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(*g*) Similar notices were advertised by the appellants in the local newspapers and in their published time-tables.

(*h*) The gate of the garage yard always remained open during the hours the omnibuses were running, and the standing omnibuses were always visible from Darwall Street. On the relevant dates officials of the company stood at the Darwall Street entrance to the yard, and in Leicester Street directed intending passengers to the omnibuses.

(*k*) The omnibuses of the appellants were not used in standing or plying for hire in any street within the urban district, but the justices found that they were used by the appellants in standing or plying for hire within the prescribed distance. It was contended for the appellants that they did not require a licence as their omnibuses were not used in standing or plying for hire in any street.

The justices overruled that contention and convicted the appellants.

Tomlin, K.C., and *Bruce Thomas*, for the appellants. The appellants' omnibuses did not require a licence. The only carriages which under the Act of 1847 are required to be licensed to ply for hire within the prescribed distance are "hackney carriages," and if that Act stood alone the appellants would be entitled to say that there were two reasons why their omnibuses were not hackney carriages. In the first place, a hackney carriage is defined in s. 38 of that Act to be a carriage which is "used in standing or plying for hire in any street within the prescribed distance," and the omnibuses in question though they plied for hire within the prescribed distance did not do so in any street. Secondly, omnibuses, that is to say stage coaches carrying passengers at separate fares, are by the same section expressly excluded from the definition of "hackney carriage," even though plying for hire in a public street. That second defence is taken away by the Act of 1889, by s. 4, sub-s. 1, of which "hackney carriage" is to include "omnibus," anything contained in s. 38 of the earlier Act notwithstanding. But the other defence that the omnibuses were not plying for hire in a street remains. It is true that s. 3 of the Act of 1889, in defining "omnibus" as a stage coach or other carriage "plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed

distance," omits the words " in any street " after the words " plying for hire." But no stress can be laid upon that omission. For in none of the sections dealing with hackney carriages in the earlier Act, except the definition section (s. 38), do the words " in any street " occur. Yet in all of them must those words be understood, for the words " plying for hire " must be read by the light of the definition; and when s. 45, which creates the offence, speaks of permitting a carriage " to be used as a hackney carriage plying for hire " it must clearly be understood as meaning " to be used for the purpose of plying for hire in a street." And if the omission of the words " in any street " is to be regarded as immaterial in the several sections of the earlier Act, it must equally be so in s. 3 of the Act of 1889, for by s. 2 the two Acts are to be read together as one Act, and it cannot be that the same word " hackney carriage " can have two different meanings in the same Act, one as applied to cabs and another as applied to omnibuses. Moreover, it was obviously the intention of the Legislature in the later Act to put omnibuses and other carriages on precisely the same footing in respect of the place of their plying for hire, for s. 3 expressly excludes " any carriage starting from and previously hired for the particular passengers thereby carried at any stable yard whereat horses are stabled and carriages let for hire." So that if the appellants' omnibuses had been horse-drawn they would have come directly within that exception. At the date of that Act motor omnibuses were not invented. Had they been the exception would have presumably been extended to apply to them. It is true that there is a difficulty in the appellants claiming the benefit of the exception as it stands, for there is no evidence of there having been any horse-drawn carriages or horses stabled in the Darwall garage yard. But the nature of the exception goes to show forcibly that the omission of the words " in any street " in the earlier part of s. 3 was unintentional and not meant to alter the meaning of " hackney carriage " as applied to an omnibus.

Barrington-Ward, for the respondent. No doubt under the Act of 1847 the appellants, even if omnibuses had not been expressly excluded from the operation of that Act, would have committed no offence, for though their omnibuses were plying for hire—*Clarke* v. *Stanford* (1)—they were not plying for hire in a street: *Curtis* v.

(1) (1871) L. R. 6 Q. B. 357.

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Embery. (1) But the Act of 1889 has introduced a new subject-matter, and the penalty section of the earlier Act, s. 45, now applies not only to hackney carriages as in that Act defined, but also to omnibuses as defined in s. 3 of the Act of 1889. The words of s. 45 must now be read as if the words were "If the proprietor . . . . permits the same to be used as a hackney carriage or as an omnibus plying for hire." The omission of the words "in any street" in the definition of omnibus in s. 3 of the later Act was intentional. It was specially desirable that omnibuses should be brought under the control of the local authority. As respects the extent of that control there is a distinction between carriages hired by individual persons, such as ordinary cabs, and omnibuses which carry a large number of wholly independent passengers. Whereas it may be enough, in the case of the former, that the local authority should exercise control in respect of the place where they ply for hire, in the case of the latter it is desirable that that control should continue to be exercised after the omnibuses have ceased to ply for hire and while they are on their journey.

Tomlin, K.C., in reply.

DARLING J. In my opinion this appeal should be allowed. There is nothing in the Act of 1889 which imposes any penalty. The only penal section is s. 45 of the Act of 1847; and before the proprietor of an omnibus can be convicted of an offence under that section it must be shown that his omnibus was a "hackney carriage" within the definition of that term in s. 38—that is to say, that it was standing or plying for hire in a street. It is said that the effect of the Act of 1889 is that s. 45 of the earlier Act must be read as if the words were "permits the same to be used as a hackney carriage plying for hire"—that is to say, in a street "or as an omnibus plying for hire" whether in a street or not. With that contention I cannot agree. I think that, whether the carriage is an omnibus or not, it must, in order to come within the penal section, be within the definition of "hackney carriage." No doubt s. 3 of the Act of 1889 says that "the term 'omnibus' shall include every omnibus . . . . stage coach and other carriage plying or standing for hire by or used to carry passengers at separate fares," omitting the words "in

(1) (1872) L. R. 7 Ex. 369.

any street." But no reliance is to be placed on that omission, for in none of the sections of the Act of 1847 in which the words "standing or plying for hire" occur are those words followed by the words "in any street" except in the definition section, s. 38; and it cannot be disputed that until the word "omnibus" was introduced by the later Act no carriage could be regarded as "plying for hire" within the penal section unless it was plying for hire in a street. Therefore the mere fact that s. 3 of the later Act omits the words "in any street" is to my mind immaterial; it stands, in respect of that omission, on precisely the same footing as the sections in the earlier, in which those words are also omitted. Moreover, I think that the later provision of s. 3 points in this direction, where it says that the term "omnibus" shall not include "any carriage starting from and previously hired for the particular passengers thereby carried at any livery stable yard . . . . whereat horses are stabled and carriages let for hire." If then these omnibuses instead of being motor-driven had been drawn by horses, the appellants could not have been proceeded against, provided the horses which drew the omnibuses were kept in the yard from which they started; and it is quite possible that even in the case of motor omnibuses the difficulty might be got over by putting a few horses into the yard and letting out horse carriages as well as motor carriages. But it is to my mind clear that the reason why horse-drawn omnibuses starting from a stable yard are excepted is not because they are horse-drawn or because their starting point is a stable yard, but because they do not ply for hire in a street, and do not invite passengers to get in after they have once started.

AVORY J. In my opinion this conviction was right and the appeal should be dismissed. The information charged the defendants with an offence under s. 45 of the Town Police Clauses Act, 1847, namely, that they unlawfully permitted an omnibus to be used as a hackney carriage standing or plying for hire within the limits of the borough of Walsall without having obtained a licence. Before I deal with the question whether the conduct of the defendants brings them within the letter of that section I should like to say that it is to my mind perfectly clear that it is within the mischief contemplated by the statute, because if the argument for the appellants is right, it follows that the drivers of these omnibuses need not be licensed.

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They may be driven by any unlicensed and incompetent person. It follows also that all the by-laws and regulations made by the local authority for the control of public vehicles will have no application to them. I think it is important to look at the powers conferred upon the local authority by the later Act of 1889. By s. 6 of that Act the Commissioners may from time to time make by-laws for certain purposes which are set out—that is to say, for regulating the conduct of proprietors, drivers, and conductors of omnibuses plying within the prescribed distance; regulating the number of persons to be carried by such omnibuses; regulating and securing the fitness of the omnibuses; securing the proper lighting of lamps for denoting the direction in which the omnibus is proceeding; providing for the exhibition of the fares to be charged to different places; and preventing—and this is particularly important in the present case—within the prescribed distance the owner, driver, or conductor of any omnibus, or any other person on their or his behalf touting, calling out, or otherwise importuning any persons to use or to be carried for hire in such omnibus. Now it is clear that if the appellants are right none of these regulations would apply to their omnibuses, although they would certainly be within the mischief aimed at by the Act. At the same time I quite agree that that is not a sufficient reason for straining the language of a statute and holding that it applies to a case to which it was obviously not intended to apply.

I come now to the question whether the appellants' conduct comes within the letter of the statutes. It seems to me that the argument of Mr. Barrington-Ward is sound and that the effect of the Act of 1889 is to add the word "omnibus" to the words "hackney carriage" in s. 45 of the Act of 1847, so that it now reads "If the proprietor of any carriage permits the same to be used as a hackney carriage or as an omnibus plying for hire within the prescribed distance without having obtained a licence as aforesaid for such carriage" he shall be liable to a penalty. If that is the proper reading it is clear that the defendants did permit a carriage to be used as an omnibus plying for hire within the prescribed distance; and it is not contended by Mr. Tomlin that the words "plying for hire" by themselves must be restricted to plying for hire in a public street; but it is suggested that s. 45 must be read as limited to a hackney carriage as defined by s. 38, that is to say, a carriage standing or

plying for hire in a street. Now it appears to me that the Act of 1889 does not say that an omnibus shall only be deemed to be a hackney carriage when it comes within the definition of s. 38. It says, in s. 4, that an omnibus shall be a hackney carriage for the purposes of various sections, including s. 45; and if an omnibus is a hackney carriage for the purpose of s. 45, then any omnibus which plies for hire within the prescribed distance without a licence is within that section, and the proprietor who permits it is liable to a penalty. It is to be observed that by s. 3 of the Act of 1889 the term "omnibus" is to include, among other things, a "stage coach and other carriage plying or standing for hire by or used to carry passengers at separate fares." Such a stage coach was expressly excluded from the operation of the Act of 1847, and I think it is matter of common knowledge that at that date stage coaches more often than not started from, and took in their passengers in, the private yard of an inn; from which it is plain that the Legislature thought that but for such express exclusion a stage coach would have come within the operation of the Act notwithstanding that it did not ply for hire in a street. In the later Act the Legislature when expressly including a stage coach must equally be taken to have done so in view of the fact that stage coaches usually started on their journey, as I have said, from the yard of some inn as distinguished from a street. Further, s. 3 goes on to exclude, amongst other carriages, omnibuses used by railway companies for conveying passengers and their luggage to or from railway stations. The reason for such exclusion was that otherwise they would have been included in the term "omnibus" and would have been brought within the provisions of the Act of 1847. For these reasons I think the conviction was right. I should like to add that if it were necessary to discuss the question whether these omnibuses were under the circumstances plying for hire in a street I should have liked further time to consider it. I am not satisfied that it has been decided in any previous case that under such circumstances as those of the present—namely, the gate of the yard being open, placards and notices directing the public to the yard, and the omnibuses being visible from the street—these omnibuses might not properly be said to be plying for hire in a street, but it is not necessary to decide that, and I postpone the expression of any opinion upon it.

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ATKIN J. The appellants were charged under s. 45 of the Town Police Clauses Act, 1847, with having permitted an omnibus to be used as a hackney carriage standing or plying for hire within the borough of Walsall. The question arises what is the meaning of "hackney carriage" in that section. There is a definition of that expression in s. 38 of that Act, namely, "carriage used in standing or plying for hire in any street within the prescribed distance. But that definition has been extended by the Act of 1889, by s. 4 of which the expression "hackney carriage" is to include every "omnibus," which expression is in turn defined by s. 3 to include "every omnibus . . . . stage coach and other carriage plying or standing for hire by or used to carry passengers at separate fares to, from, or in any part of the prescribed distance." The result is that when considering whether a particular carriage comes within s. 45 you must not look at the definition of hackney carriage in s. 38 alone, but you must also look at the definition of omnibus in s. 3 of the later Act, and must read that in as included in the expression "hackney carriage" in s. 45; and in that definition of omnibus you have not got the element of standing or plying for hire "in a street." All we have to consider is whether this was an omnibus plying for hire within the prescribed distance; and if it was, then whether or not the proprietors were using it as an omnibus so plying for hire within that distance. I think the case clearly falls within the statute and that the conviction was right. There is one matter that I should like to refer to, though I express no opinion upon it, namely, whether, if this case had to be sent back for decision upon the question, it would not have been open to the magistrates to find that the appellants here were permitting their omnibus to be used for plying for hire in a street. In this case the magistrates have found the contrary. I only desire to say that in another case it appears to me that upon similar facts it might be possible for the magistrates to come to a different conclusion. The result is that the appeal will be dismissed.

Appeal dismissed.

Solicitor for appellants: *Sydney Morse.*

Solicitors for respondents: *Davenport, Cunliffe & Blake.*

J. F. C.

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April 24, 25.

Hire-purchase Agreement—Option to purchase—Sale by Hirer—Repudiation of Agreement—Detinue—Conversion—Measure of Damages.

The plaintiffs let a piano on the terms of a hire-purchase agreement whereby the hirer had an option to purchase it by payment of a certain number of quarterly instalments, but was to remain a bailee only until the last of such instalments should be paid, the hirer having the right at any time to terminate the agreement by returning the piano to the plaintiffs. The hirer paid several of the instalments, but before they were fully paid sold the piano to the defendant. In an action of detinue and conversion:—

Held, that the defendant had acquired no interest in the piano, for that the hirer by wrongfully selling it had ipso facto repudiated the agreement and therefore had no interest in it to convey; and that the measure of damages was consequently the full value of the piano, and not merely the amount of the instalments remaining unpaid.

Belsize Motor Supply Co. v. *Cox* [1914] 1 K. B. 244 distinguished.

APPEAL from the Marylebone County Court.

In December, 1915, the plaintiffs let a piano to a Miss Nolan on the terms of a hire-purchase agreement whereby the hirer agreed that she would pay a quarterly sum of 2*l.* 13*s.* 11*d.* so long as she saw fit to continue the hire, and would not remove the piano without the consent of the plaintiffs, and that in case of breach of the agreement the plaintiffs might retake possession, and the plaintiffs agreed that the hirer might at any time terminate the agreement by returning the piano to the plaintiffs, that she might become the owner of it by punctually paying the said quarterly sums until the full sum of 32*l.* 7*s.* should be paid, but that until such full sum was paid she should remain a bailee only, and that should the plaintiffs retake possession by virtue of the agreement the hirer should be entitled to resume the hiring on payment of the arrears of hire. Miss Nolan paid certain of the quarterly instalments amounting to 10*l.* 15*s.* 8*d.*, and on December 3, 1916, she sold the piano together with the rest of the furniture in her flat to the defendant, Grace Hilt, who purchased innocently and without notice of the hire-purchase agreement. Miss Nolan at the time of the sale made a false statutory declaration that the piano was her property. On December 7 a

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further instalment under the hire-purchase agreement became due and Miss Nolan paid it, thereby making the total payments by her 13*l.* 9*s.* 7*d.* She subsequently disappeared. When the next instalment became due in March, 1917, the plaintiffs applied for payment, and, their letter being returned, they discovered the fraud. They required the defendant to give up the piano, but she refused to do so, though she offered to pay the balance of the instalments remaining unpaid amounting to 18*l.* 17*s.* 5*d.* The plaintiffs then sued the defendant in the county court for detinue, and alternatively for conversion of the piano. The defendant paid into Court the said sum of 18*l.* 7*s.* 5*d.* in satisfaction of the plaintiffs' claim. The county court judge held, on the authority of *Belsize Motor Supply Co.* v. *Cox* (1) that the measure of the damages was not the full value of the piano, but the amount of the hire-purchase money remaining unpaid, and as that had been paid into Court he gave judgment for the defendant. In the event of the case going further he fixed the value of the piano at 28*l.* The plaintiffs appealed.

Schwabe, K.C., and *Wetton*, for the appellants. By the terms of the hire-purchase agreement the hirer, Miss Nolan, had merely an option to purchase; she was under no obligation to do so, and might at any time terminate the agreement by returning the piano to the plaintiffs. Under these circumstances, if the judgment of Lord Macnaghten in *Helby* v. *Matthews* (2), where the agreement was in substantially the same form as in the present case, is correct, the hirer had no interest at all to assign. He says: "It was the intention of the parties—an intention expressed on the face of the contract itself—that no one of those monthly payments until the very last in the series was reached, nor all of them put together without the last, should confer upon the customer any proprietary right in the piano or any interest in the nature of a lien, or any interest of any sort or kind beyond the right to keep the instrument and use it for a month to come." The defendant consequently acquired no interest by the sale to her, and the measure of damages must be the full value of the piano. But even if Lord Macnaghten's view is not right, and if the hirer had an interest in the piano up to the time of the sale, immediately that she purported to sell it her interest was

(1) [1914] 1 K. B. 244. (2) [1895] A. C. 471, 481.

determined, for the sale was in direct violation of the agreement; she was purporting to sell that of which she was merely a bailee. The sale therefore amounted to a repudiation of the agreement. The case of *Belsize Motor Supply Co.* v. *Cox* (1), on which the county court judge relied, even if it was rightly decided, is distinguishable. There the hirer of a chattel under a hire-purchase agreement in a similar form, before the whole of the hire-purchase money was paid, pledged it to the defendant. It was held by Channell J. that the pledgee had acquired an interest in the chattel, and that in an action of detinue by the owners the measure of damages was the value of their interest in it, namely, the amount of the instalments remaining unpaid, and no more. But there the pledge, notwithstanding that it was in breach of the agreement, did not amount to a repudiation of it, and the hirer had still a right to become the owner on payment of the balance of the purchase-money, and that right passed under the pledge to the defendant. That case is in complete accord with that of *Donald* v. *Suckling* (2), where the pledgee of debentures as security for the due payment of a bill before maturity of the bill repledged them with the defendant, and it was held that the repledge did not put an end to the contract of pledge, and that the pledgor could not maintain detinue without having paid or tendered the amount of the bill. Blackburn J. said (3): "I think that the subpledging of goods, held in security for money, before the money is due, is not in general so inconsistent with the contract, as to amount to a renunciation of that contract." But a sale, unlike a pledge, is wholly inconsistent with the hire-purchase agreement. In *Cooper* v. *Willomatt* (4) it was expressly decided that a bailee of goods for hire by selling them determines the bailment, and that the bailor may maintain trover against the purchaser for the full value of the goods. Further, the action here is primarily in detinue, and only alternatively for conversion, and in the former action no question of the measure of damages really arises. In detinue the defendant cannot plead payment into Court of the value of the goods in satisfaction of the plaintiff's claim: *Allan* v. *Dunn.* (5) The plaintiff is entitled to the return of the specific goods, unless their return is

(1) [1914] 1 K. B. 244.
(2) (1866) L. R. 1 Q. B. 585.
(3) Ibid. 615.
(4) (1845) 1 C. B. 672.
(5) (1857) 1 H. & N. 572.

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impossible, in which case he is entitled to their value, *Peters* v. *Heyward*. (1) The option of determining whether the value shall be paid or the goods themselves given up lies with the plaintiff, and the judge has no discretion in the matter. In *Eberle's Hotels Co.* v. *Jonas* (2) Bowen L.J. said: "It is true that the defendant had the power, though not the right, to defeat the claim to the specific goods, and, in the event therefore of its being impossible for the plaintiff to get redelivery of the specific goods, the judgment was in the alternative for their value. But the right of the plaintiff was always to the possession of the goods, and to provide a remedy for this defect in the common law procedure s. 78 of the Common Law Procedure Act, 1854, was passed, which has been followed by Order XLVIII., to enable the judge to enforce delivery of the specific chattel detained." By Order XLVIII., r. 1, of the Supreme Court Rules "the Court may . . . . order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property, upon paying the value assessed." And Order XXV., r. 69, of the County Court Rules is in the same terms. In both those rules "may" means "must."

S. H. Leonard and *J. H. Spoule*, for the respondent. The hire-purchase agreement in this case contained two separate and distinct contracts—(1.) of bailment to the hirer; (2.) of option to purchase. If the hirer commits a breach of the agreement the owners have only two remedies—they may retake possession of the piano or they may sue for damages. If they adopt the former remedy, that does not put an end to the option to purchase. The contract of option is independent of the continued existence of the bailment. It is expressly so provided, for the agreement says that if the owners retake possession under the agreement the hirer shall still be entitled to resume the hiring on payment of the arrears of hire. Here the hirer had paid 13*l.* 9*s.* 7*d.*, and had only to pay a further 18*l.* 17*s.* 5*d.* to become the owner. That sum the defendant brought into Court. On December 3 when the defendant purchased the piano Miss Nolan was not even in default, and she had a subsisting option to purchase. The sale may have been inconsistent with the contract of bailment, but not with that of option to purchase. The hirer having a right of option to purchase was entitled to sell that

(1) (1645) Cro. Jac. 681. (2) (1887) 18 Q. B. D. 459, 468.

right to the defendant. The case of *Belsize Motor Supply Co.* v. *Cox* (1) was correctly treated by the judge below as supporting the defendant's contention, and it is not distinguishable upon the ground suggested that there is a difference between a pledge by the hirer and a sale. A sale by a bailee does not, any more than a pledge, terminate the bailee's interest. That it did so was indeed the ground of the judgment of Williams J. in *Johnson* v. *Stear* (2), but he was a dissenting judge. There goods had been pledged as security for a bill of exchange with a power of sale if the bill was not paid at maturity. The pledgee sold the goods the day before the bill matured. The pledgor became bankrupt, and his assignees brought trover and sought to recover the full value of the goods without any reduction. Williams J. held that they were so entitled on the ground that, "the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner, against all the world." The majority of the Court held otherwise, that "the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract."

In *Donald* v. *Suckling* (3) Blackburn J. said with reference to the passage cited from the judgment of Williams J.: "If this was correct, the present plaintiff," who had repledged the debentures there in question, "is entitled to judgment," showing that he drew no distinction between a sale by a pledgee and a repledge. He went on to say that the decision in *Johnson* v. *Stear* (2) might be rested on the ground "that the sale, though wrongful, was not so inconsistent with the object of the contract of pledge as to amount to a repudiation of it." That is directly applicable to the present case. The same proposition was established in *Halliday* v. *Holgate*. (4) There a holder of scrip certificates for shares pledged them with the defendant as security for the payment of a promissory note payable on demand given by him to the defendant. The pledgor became bankrupt, and the defendant, without demand, sold enough of the shares to pay the amount of the note. The bankrupt's

(1) [1914] 1 K. B. 244.
(2) (1863) 15 C. B. (N.S.) 330, 335, 341.
(3) L. R. 1 Q. B. 585, 617.
(4) (1868) L. R. 3 Ex. 299.

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assignee, without tendering the amount of the note, brought trover against the defendant to recover the value of the shares. It was held by the Exchequer Chamber that, even assuming the sale to be wrongful, the immediate right to the possession of the shares was not by the sale revested in the plaintiff, and that he could not maintain trover, either for the whole value of the shares or for nominal damages. The contention of the plaintiffs that because the action is framed in detinue they are entitled to the return of the specific chattel detained or its full value is misconceived. They cannot better their position by framing the action in one form rather than another. The action of detinue, like that of trover, is based on an immediate right of possession in the plaintiff, and consequently, if there is an existing interest in the defendant which is inconsistent with the plaintiff's immediate right to possession, he cannot sue. So far as damages are concerned, the measure is precisely the same in both forms of action. The question whether the defendant had such an interest brings back the inquiry to the same point, whether the wrongful sale by the hirer put an end to the option to purchase, and that, it is contended, it did not do. If the plaintiffs' contention be held to be right, the result will be very inequitable, for, having received a considerable portion of the price, they will be entitled to retain that and recover the full value of the chattel too.

Schwabe, K.C., was not called on to reply.

SALTER J. The facts are that in December, 1915, the plaintiffs let a piano to a Miss Nolan under a hire-purchase agreement. By that agreement it was provided that periodical payments were to be made for the hire, and that the hirer might become the owner upon paying all the instalments, but that until the last of the instalments was paid she was to remain a bailee only. Down to December, 1916, Miss Nolan had paid all the instalments that were due, and on December 3, at a time when she not in default, she sold the piano to the defendant. At the time of that sale she made a false statutory declaration that the piano was her property, and the defendant bought it in good faith and took possession of the flat in which the piano was. On December 7 another instalment became due and Miss Nolan paid it. She shortly afterwards disappeared. The next instalment became due in March, and the

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plaintiffs, who had no knowledge of the sale, wrote to the flat demanding the sum due, but their letter was returned. In June, another instalment being due and unpaid, the plaintiffs demanded a return of the piano. There had at that time been paid by the hirer instalments amounting to 13*l.* 9*s.* 7*d.* in all, and there remained of the hire-purchase money unpaid a sum of 18*l.* 17*s.* 5*d.* The defendant offered to pay that sum, but refused to return the piano. The plaintiffs then sued in detinue, claiming a return of the piano or its value, and damages for the detention; alternatively they claimed damages for conversion. The defendant paid the said sum of 18*l.* 17*s.* 5*d.* into Court. The judge found that that was sufficient to satisfy the plaintiffs' claim and gave judgment for the defendant. I do not think it necessary in this connection to draw any distinction between an action of detinue and one of conversion. As a general rule a plaintiff who is the owner of a chattel which is detained by the defendant is entitled to the return of it or its value. But there is an exception where the defendant has an interest in the chattel, in which case the plaintiff cannot recover more than the value of his own interest after making allowance for that of the defendant; and this exception obtains equally whether the action be for conversion or detinue. Had, then, the defendant an interest in the chattel at the time of action brought? It is clear she could have no rights except what she got from Miss Nolan. It is necessary, therefore, to consider whether Miss Nolan had any interest such as to bring her within the above exception, and, if so, whether she transferred that interest to the defendant. It is clear that if the former had any interest it must be by virtue of the agreement alone. Could she, then, when selling to the defendant rely upon the agreement? No doubt the mere fact of her committing some breach of the agreement which would have entitled the plaintiffs to resume possession would not necessarily prevent her from relying upon it, but if it was such a breach as to amount to a repudiation of the agreement it would put an end to her interest. Then did the sale of the piano under the circumstances amount to a repudiation of the agreement? I think that it did. Being a fraudulent sale with intent to pass the whole property in a chattel which she knew was not hers, it was wholly inconsistent with the agreement, whether you look at that portion of it which dealt with the bailment or that which gave the

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option to purchase. She had therefore at the date of the sale no interest in the piano at all which she could transfer to the defendant. It is not necessary to consider whether *Belsize Motor Supply Co.* v. *Cox* (1) was or was not rightly decided upon the facts of that case, for it is distinguishable. The hirer in that case did not sell the chattel—he only pledged it; and it does not follow that because a sale of the chattel will amount to a repudiation of a hire-purchase agreement a pledge of it must equally do so. We think the plaintiffs are entitled to judgment for the return of the piano or the sum of 28*l.* its value.

ROCHE J. I agree. As we are differing from the county court judge, who founded his judgment on the case of *Belsize Motor Supply Co.* v. *Cox* (1), I wish to make it clear that in so doing we are not differing from the decision of Channell J. in that case. The facts of the two cases are substantially different. There the hirer pledged the motor car with the defendant—he did not purport to sell it; and it was not argued that the act of pledging it amounted to a repudiation of the agreement. Here the hirer fraudulently sold the piano out and out, and that, in my opinion, is a complete renunciation of the hire-purchase agreement. The hirer, therefore, at the time of the sale had no rights under that agreement to transfer.

Appeal allowed. Leave to appeal.

Solicitor for appellants: *H. E. Tudor.*

Solicitors for respondent: *Peachey & Co.*

(1) [1914] 1 K. B. 244.

J. F. C.

RUSSIAN BANK FOR FOREIGN TRADE *v.* EXCESS INSURANCE COMPANY, LIMITED.

[1916 R. 828.]

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March 26;
April 11, 17.

Insurance (Marine)—Restraints of Princes—Exception—Claims due to Delay—Closing of Dardanelles—Ship in Foreign Waters—Requisition by Admiralty—Proclamation of August 3, 1914—*Ultra Vires Order—Royal Prerogative.*

A parcel of barley shipped by the plaintiffs on board a British steamship for carriage from Novorossisk to Falmouth was insured against the usual perils, including restraints of princes and the risks excluded by the free of capture and seizure clause, but excluding "all claims due to delay." Owing to the closing of the Dardanelles and the declaration of war against Turkey the ship was unable to make the voyage from Novorossisk to Falmouth, and the cargo was landed, and the ship remained, at Novorossisk. Subsequently the ship, while at that port, was requisitioned by the Admiralty for the use of the Russian Government. The plaintiffs claimed under the policy for a constructive total loss of the barley:—

Held, that the loss was not recoverable, on the grounds (1.) that, although the closing of the Dardanelles was a restraint of princes, the claim based thereon was a claim due to delay within the exception in the policy: *Bensaude* v. *Thames and Mersey Marine Insurance Co.* [1897] A. C. 609 followed; and (2.) that the order requisitioning the ship was not within the Royal prerogative, and was ultra vires the Admiralty as the Proclamation of August 3, 1914, only authorized the requisitioning of British ships within the British Isles or the waters adjacent thereto, and that the compliance of the shipowners with the order, not having been brought about by threats, or use, of force, was therefore not due to a restraint of princes.

Action in the commercial list tried by Bailhache J. without a jury.

The following statement of facts is taken from the written judgment: "The plaintiffs, the Russian Bank for Foreign Trade, shipped on board the steamship *Wolverton* at Novorossisk a parcel of barley in September and October, 1914, for carriage to Falmouth for orders. They insured the barley upon the intended voyage with the defendants by a policy dated October 7, 1914, against the usual perils, including restraints of princes, and against the risks excluded by the free of capture and seizure clause, but the policy

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excluded 'all claims due to delay.' The *Wolverton* had not sailed when the Turkish Government closed the Dardanelles. This step was followed by the declaration of war of November 5, 1914. From that date the commercial object of the adventure was frustrated and the insured voyage became impossible. The *Wolverton* with the barley on board remained at Novorossisk till the barley began to heat, when, between December, 1914, and February, 1915, it was discharged into warehouse there and reconditioned. It could have remained unhurt in warehouse for a year or so. The position as regards both ship and cargo was unaltered when on March 5, 1915, the shipowners were directed by the Lords of the Admiralty to place their steamship at the disposal of the Russian Government, and this they did, but I gather the Russians made no use of her. Upon this requisition the plaintiffs telegraphed on March 5 to their insurance brokers here as follows: '*Wolverton* requisitioned by British Government account Russian Government. Impossible reload barley. Consider case covered by war risk. Agreeable release underwriters from all risks if underwriters will pay difference between present value in Novorossisk and insured value.' This telegram was shown to the defendants, who, with the other underwriters concerned, took legal advice upon their position, and on March 15 they declined liability. This decision was communicated to the plaintiffs, who in their turn took legal advice. Their lawyer's opinion was sent to them on or about April 10, 1915. On its receipt the plaintiffs, with a view to concerted action, consulted with the other shippers on the same steamship, and on July 5 cabled their brokers to give notice of abandonment. This was done on July 8 in these terms: 'Ss. *Wolverton* Novorossisk to United Kingdom (Admiralty approved). We are informed by the assured of the following consignments of barley insured per above steamship that the interests have been discharged at Novorossisk, and owing to the inability of the vessel to perform her voyage in consequence of the warlike operations they instruct us to abandon to you, and we hereby abandon to you, their interest in such shipments and claim from you a total loss of the sums insured.' This notice was refused by the underwriters, whereupon this action was brought to recover as for a constructive total loss of the barley by restraint of princes."

R. A. Wright, K.C., and *Le Quesne*, for the plaintiffs. There was a total frustration of the adventure, whether the closing of the Dardanelles or the subsequent requisitioning of the ship by the British Government for the use of the Russian Government be regarded as the cause: *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (1) There was, therefore, a constructive total loss by a peril insured against, namely, restraint of princes.

MacKinnon, K.C., and *Simey* for the defendants. The alleged requisitioning cannot be relied on as constituting a restraint of princes, for the Proclamation of August 3, 1914 (2), which authorized the requisitioning of British ships only applies to those ships when in British waters. There was therefore no power to requisition this ship. It was not in fact a case of a requisition. The adventure had been frustrated by the closing of the Dardanelles, and the owners, seeking fresh employment for their ship, entered into a contract of service with the Russian Government. The closing of the Dardanelles was not a restraint of princes, but a mere apprehension of a restraint, and that is not sufficient: *Hadkinson* v. *Robinson* (3); *Kacianoff* v. *China Traders Insurance Co.* (4); *Geipel* v. *Smith* (5); *Becker, Gray & Co.* v. *London Assurance Corporation.* (6) Further, a claim for a loss caused by the frustration of the adventure is a claim due to delay within the meaning of those words in the policy: *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (7); *Wilson Brothers* v. *Green* (8); *Turnbull, Martin & Co.* v. *Hull Underwriters' Association.* (9) Lastly, the only notice of abandonment on which the plaintiffs can rely, namely, the notice of July 8, was given too late.

R. A. Wright, K.C., in reply. A requisition of a ship outside British waters is justified under the Royal prerogative: *Capel* v. *Soulidi* (10); *In re a Petition of Right.* (11) The closing of the

(1) [1916] 1 A. C. 650.

(2) Proclamation dated August 3, 1914, authorizing the Lords Commissioners of the Admiralty to requisition any British ship or British vessel within the British Isles or the waters adjacent thereto. (1914. No. 1247.)

(3) (1803) 3 Bos. & P. 388.

(4) [1914] 3 K. B. 1121.

(5) (1872) L. R. 7 Q. B. 404.

(6) [1918] A. C. 101.

(7) [1897] A. C. 609.

(8) (1915) 31 Times L. R. 605.

(9) [1900] 2 Q. B. 402.

(10) [1916] 2 K. B. 365.

(11) [1915] 3 K. B. 649.

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Dardanelles was more than an apprehension of a restraint; it was an actual restraint: *Watts, Watts & Co.* v. *Mitsui & Co.* (1) There is a distinction between the case of a ship which is in a place from which egress is prevented, and a case where the ship can make an attempt to arive at her destination but will incur a risk of capture if she does make the attempt. In the latter case, of which *Hadkinson* v. *Robinson* (2) is an example, the risk is not within the policy; in the former case it is: *Rodoconachi* v. *Elliott.* (3) The exception of delay in this policy cannot be construed so as wholly to override the perils expressly named in the policy. This was not a case of delay, but of absolute detention.

Cur. adv. vult.

April 17. BAILHACHE J., having stated the facts as set out above, continued: The case made for the plaintiffs at the trial differed materially from the case as pleaded. In the points of claim the restraint relied upon was the requisitioning of the *Wolverton*; in argument the restraint relied upon was the closing of the Dardanelles. In the points of claim the notice of abandonment pleaded was the formal notice of July 8, 1915; in argument the notice relied upon was the cablegram of March 5, 1915. I will deal first with the case as presented to me in argument.

There is no doubt that the action of the Turkish Government in closing the Dardanelles frustrated the adventure, and if this were a charterparty case the decision in *Geipel* v. *Smith* (4) would be in point and a decision in the plaintiffs' favour. This is not a charterparty but a marine insurance case, and although the words "restraints of princes" mean the same whether in charterparties or in policies, it is evident from a comparison of *Hadkinson* v. *Robinson* (2) with *Geipel* v. *Smith* (4) that an adventure may be frustrated by restraint of princes so as to excuse performance of a charterparty by a shipper or shipowner, and yet not give any right of action against underwriters for a constructive total loss. The reason for the distinction is not to be sought in any difference in the meaning of the phrase, but in the strictness with which the doctrine of proxima causa is applied in insurance cases. It is clear upon the

(1) [1917] A. C. 227.
(2) 3 Bos. & P. 388.
(3) (1874) L. R. 9 C. P. 518.
(4) L. R. 7 Q. B. 404.

authorities that the closing of the Dardanelles was a restraint of princes, and the only doubt is whether that act was the proximate, or, as Lord Sumner prefers (1), the direct, cause of the destruction of the adventure in the sense required by insurance law. Stated in terms of decided cases, the question is whether this is a case of the *Hadkinson* v. *Robinson* (2) class or the *Rodoconachi* v. *Elliott* (3) class. I think it is of the latter class, and I am the less concerned to discuss the point because in *Watts, Watts & Co.* v. *Mitsui & Co.* (4) the judgments in all the Courts, including the House of Lords, proceed upon the footing that circumstances such as those in the present case would give rise to a claim for constructive total loss. I think, therefore, the closing of the Dardanelles was such a restraint of princes as would, on due notice of abandonment, constitute a constructive total loss of the barley.

The defendants have two answers to this. First, they refer to the written clause in the policy reading "Excluding all claims due to delay," and they say the claim based upon the closing of the Dardanelles is a claim due to delay. I must deal with this answer a little closely, because I confess that I thought during the argument there was very little in the point. I have since read the decision of the House of Lords in *Bensaude* v. *Thames and Mersey Insurance Co.* (5) two or three times, and I am now satisfied that the point is one that deserves very careful consideration.

The policy in this case contains these three written clauses: "This insurance also to cover the risks excluded by the free of capture and seizure clause"; "excluding all claims due to delay"; "excluding deterioration and loss of market." The *Bensaude Case* (5) was one of insurance on freight, and the material clause ran: "Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise." I cannot distinguish these words from the second written clause in this policy. The words "whether arising from a peril of the sea or otherwise" are surplusage, for every claim upon a policy must arise from a peril insured against. The words "any claim consequent on loss of time" must mean

(1) See *Becker, Gray & Co.* v. *London Assurance Corporation*, [1918] A. C. 101, 114.

(2) 3 Bos. & P. 388.

(3) L. R. 9 C. P. 518.

(4) [1917] A. C. 227.

(5) [1897] A. C. 609.

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any claim for losses due to delay, and the words in this policy "claims due to delay" obviously mean the same thing. In the *Bensaude Case* (1) the main shaft of the steamship *Peninsula* broke owing to a peril of the sea. It was impossible to repair it within any reasonable time; the voyage was thus frustrated and the freight lost. Upon those facts the House of Lords held that the claim against the underwriters for a total loss of freight failed upon the ground that such a claim was "consequent upon loss of time" within the warranty in the policy. Lord Herschell says (2) "That loss must arise from one of the perils insured against. What is the meaning of saying that the underwriter is not to be liable for any claim consequent upon loss of time? It must mean that although the subject-matter insured has been lost, and although it has been lost by a peril insured against, if the claim depends on loss of time in the prosecution of the voyage so that the adventure cannot be completed within the time contemplated, then the underwriter is to be exempt from liability." I confess I cannot distinguish the two cases. In the *Bensaude Case* (1) there was a peril insured against, namely, of the sea—the propeller shaft broke. Here there was a peril insured against, namely, restraint of princes—the Dardanelles were closed. In *The Bensaude Case* (1) the broken propeller shaft necessitated such delay in the prosecution of the voyage that the adventure was frustrated. Here the restraint of princes did the same thing. In both cases it was delay due to a peril insured against, which caused in one case the total loss of the freight, and in the other the constructive total loss of the cargo. The fact that the subject-matter insured was in the one case freight and in the other case barley seems to me immaterial.

I do not forget that in this case there are three written clauses which must all have a meaning given to them if possible, and I think this can be done without doing violence to any one of them. The words "excluding deterioration or loss of market" in the third clause show that the words "excluding all claims due to delay" in the second clause are not restricted to such classes of losses as deterioration or loss of market. They may cover the same ground, but they are certainly of wider import. Nor do the words in the second clause nullify the first clause, which restores the free of

(1) [1897] A. C. 609. (2) Ibid. 614.

capture and seizure clause, or wholly exclude the printed words "restraint of princes," for there may well be forms of restraint which involve capture or physical detention or confiscation of the goods. I own I am surprised at the result thus arrived at, but I think the defendants' first answer is a good one.

The defendants' second answer to the plaintiffs' claim based on the closing of the Dardanelles is that they gave no notice of abandonment. In that the defendants are right, for assuming for the moment that the cablegram of March 5, 1915, was a sufficient notice of abandonment, it was not based upon the closing of the Dardanelles but upon the requisitioning of the *Wolverton*. I am not saying that a clear and unqualified notice of abandonment would be bad if based upon the wrong grounds when good grounds existed, but this cablegram cannot be treated as a notice of abandonment at all apart from the reference to the requisitioning of the *Wolverton*. The plaintiffs, for some reason or other, probably because they had a better appreciation than myself of the *Bensaude Case* (1), never treated the frustration of the adventure by the closing of the Dardanelles as giving them a right to claim as for a constructive total loss. Even, therefore, if the loss would otherwise fall upon the policy, the failure to give notice of abandonment is fatal. I may add that I should in any case have held that a notice given on March 5 was too late. There was no pretence for supposing, after the declaration of war against Turkey on November 5, 1914, that the Dardanelles would be open within any reasonable time, and to have waited four months before giving notice of abandonment would have been too long. The result is that the closing of the Dardanelles does not avail the plaintiffs.

I now address myself to the restraint of princes relied upon in the points of claim, namely, the requisitioning of the steamship *Wolverton* by the Lords of the Admiralty for the Russian service. The fact that the plaintiffs did not choose to give notice of abandonment to their underwriters upon the closing of the Dardanelles, even assuming that they could have done so, does not preclude them from claiming for a constructive total loss if, while the goods are still in specie, some subsequent restraint of princes has happened which justifies such a claim : see *Woodside* v. *Globe Marine Insurance*

(1) [1897] A. C. 609.

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Co. (1) An order or requisition by the Lords of the Admiralty, if within their powers, is binding upon a British owner; and if he, as a loyal subject, obeys it, and by his obedience the goods which he has engaged to carry cannot be carried at all, or cannot be carried to their destination, the insured adventure is destroyed by restraint of princes as the proximate cause of the destruction, and the owner of the goods, upon giving timely notice of abandonment, can recover against his underwriters for a constructive total loss: see *British and Foreign Marine Insurance Co.* v. *Sanday & Co.* (2) The defendants, however, say that the requisition in this case was ultra vires, and that an ultra vires command is not a restraint of princes. I have searched in vain for authority upon the point. None was cited to me, and I can find none. There are suggestions here and there from which inferences may be drawn, but nothing more, I must therefore deal with the matter as best I can, without the assistance from authority which I should have been glad to have had. The point is of importance.

The requisition was, in my opinion, ultra vires. On March 5. 1915, the only authority the Admiralty had to requisition ships was given to them by the Proclamation of August 3, 1914, and was confined to the requisitioning for His Majesty's service of vessels of British owners within the British Isles or the waters adjacent thereto. It is suggested by the plaintiffs that the requisition in this case is within the Royal prerogative. The point was not pressed; I was not referred to any Proclamation or Order in Council, and I know of no such prerogative. Where restraint takes the form of an order and nothing more, that order must, in my opinion, be one that has behind it the forces of the State, which can, if necessary, be lawfully employed to compel obedience if obedience is refused. Now, an order ultra vires the Admiralty could not lawfully be enforced by seizure, detention, or confiscation of the ship, the subject-matter of the order, or by fine or imprisonment of her owner. Obedience to such an order, however praiseworthy in a loyal citizen, is, in my opinion, a voluntary act on his part and not a restraint of princes. It is quite otherwise if the order is accompanied by threats of force, or followed by the use of force. In such a case, disobedience not being illegal, the use of force to compel

(1) [1896] 1 Q. B. 105. (2) [1916] 1 A. C. 650.

obedience is illegal, and is a restraint of princes upon which a claim against the underwriters for loss by restraint may be founded: see *Lozano* v. *Janson.* (1)

Pursuing the matter further, at the expense of reiteration, the intra vires order of the British Admiralty to a British owner is a restraint of princes, and loss due to obedience to such an order is recoverable from underwriters. Disobedience to such an order is an illegal act and renders the policies void. Force used to compel obedience is a restraint of princes, but loss due to resistance to such force cannot be recovered from underwriters. Where the order is ultra vires the opposite is the case. Disobedience to such an order is not illegal, but the employment of force to compel obedience is. Its employment is a restraint of princes, the policies are not avoided, and losses due to the restraint are recoverable. It seems to me to follow that as disobedience to an ultra vires order is not illegal, obedience to such an order, unless compelled by force, or threats of force, is a voluntary act and not a restraint of princes. If so, the destruction of the adventure due to the compliance of the owners with the requisition of the *Wolverton* was not a loss due to the restraint of princes, and I so hold.

The decision at which I have arrived renders it unnecessary to consider whether due notice of abandonment was given, but I will state my opinion upon the point in case my views upon the requisitioning of the *Wolverton* are held to be wrong.

The notice pleaded of July 8, 1915, was, I think, clearly too late, even if it is not objectionable for the grounds it gives. The cable of March 5, 1915, was in time, and it gives the right ground if it ought to be treated as a notice of abandonment at all. It is not necessary to give notice in any particular form, or to use the word "abandon," in spite of Lord Ellenborough's observations in *Parmeter* v. *Todhunter.* (2) It is now sufficient that the notice should be in such terms as conveyed the assured's instruction to the underwriters: see *Currie & Co.* v. *Bombay Native Insurance Co.* (3) I have had the advantage of the views of the defendants' under writer upon the cablegram, and he tells me that although he does not remember seeing it, yet upon reading it he regards it as a notice

(1) (1859) 2 E. & E. 160. (2) (1808) 1 Camp. 541.
(3) (1869) L. R. 3 P. C. 72.

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of abandonment, followed by a suggestion of compromise. That it was so understood by the underwriters at the time is fairly plain, as they took legal advice upon it and upon the position generally, and declined liability. I am satisfied that the defendants' underwriter saw the cablegram, and entirely accept his statement that he has forgotten the fact. The defendants, very naturally, refer me to two letters of the brokers of April 10 and July 2, 1915, in which they inform the plaintiffs that they have not given notice of abandonment. The brokers' clerk was called, and he stated that in writing those letters he had in mind the formal notice in set terms which brokers are in the habit of giving. In any case, as the plaintiffs themselves desired notice to be given, and as the brokers showed the cablegram to the underwriters, and the latter understood it as notice of abandonment, the view of the brokers is not very material. I should be disposed to hold, if necessary, though with some hesitation, that the cablegram of March 5, 1915, was, in the circumstances, a sufficient notice of abandonment.

The net result is that there must be judgment for the defendants, with costs.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *William A. Crump & Son.*

F. O. R.

[IN THE COURT OF APPEAL.]

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April 18, 19; *May* 3.

REPTON SCHOOL GOVERNORS *v.* REPTON RURAL DISTRICT COUNCIL.

[1917 R. 69.]

Local Government—Building—"New Building"—By-law—Air Space at Rear of New Building—Reasonableness of By-law—Public Health Acts Amendment Act, 1907 (7 *Edw.* 7, *c.* 53), *s.* 23.

The plaintiffs proposed to build an addition to the front of one of the school boarding-houses consisting of a projection containing three rooms one above the other. By s. 23 of the Public Health Acts Amendment Act, 1907, this addition was deemed to be a "new building" for the purposes of the Public Health Acts, and any by-laws made thereunder. The defendants refused to approve the plans, as the proposed addition would infringe one of their by-laws, which provided that "every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building, and of an aggregate extent of not less than one hundred and fifty square feet." The plaintiffs contended that the by-law was unreasonable because it was impossible to provide an open space at the rear of a new building which consisted of an addition to an existing building:—

Held, that the by-law was unreasonable and therefore bad.

Judgment of Bailhache J. [1918] 1 K. B. 26, affirmed.

APPEAL from the judgment of Bailhache J. in an action tried without a jury. (1)

In 1916 the plaintiffs proposed to make an addition to the front of one of the school boarding-houses, the addition consisting of a projection three storeys high containing a small room on each floor. (2) The work was commenced by the plaintiffs without plans having been deposited by them with the defendant council. On the demand of the defendants plans were deposited on September 21, 1916, and the execution of the work was suspended soon after that date. By virtue of s. 23 of the Public Health Acts Amendment Act, 1907 (3) (which was in force within the defendants' district), the addition to the house proposed to be made by the plaintiffs was a

(1) [1918] 1 K. B. 26.

(2) The plaintiffs also added a servants' hall of one storey, a porch, and a bow window, to which no objection was raised by the defendants.

(3) Public Health Acts Amendment Act, 1907, s. 23: "For the

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"new building" for the purposes of the defendants' by-laws. On September 28, 1916, the defendants refused to approve the deposited plans on the ground that the addition to the house did not comply with their by-laws. These were made in 1902 under s. 157 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and were in the model form issued by the Local Government Board. By-laws 11 to 17, both inclusive, were headed "With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings." The material by-law was No. 12, which was in these terms: "(1.) Every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building, and of an aggregate extent of not less than one hundred and fifty square feet, and free from any erection thereon above the level of the ground, except a water closet, earth closet, or privy, and an ashpit.' "(2.) He shall cause such open space to extend, laterally, throughout the entire width of such building, and he shall cause the distance across such open space from every part of such building to the boundary of any lands or premises immediately opposite or adjoining the site of such building, to be not less in any case than fifteen feet." By-law No. 11 provided that there should be an open space in front of a new domestic building, and by-laws 13 and 14 provided for windows being constructed in the external walls of a new domestic building. The defendants said that the addition did not comply with by-law No. 12 as to the provision of an open space at the rear thereof. The plaintiffs contended that it was impossible to provide an open space at the rear of a new building which consisted of an addition to the front of an existing building and that the by-law in question which required the provision of an open space in the rear of new buildings was bad as being unreasonable. Except for not showing an open space at the rear, the plans were in accordance with the defendants' by-laws. Correspondence

purposes of this Act and the Public Health Acts, and any bye-laws made thereunder, each of the following operations, namely: . . . .

"(*d*) The making of any addition to an existing building by raising any part of the roof, by altering a wall, or making any projection from the building, but so far as regards the addition only . . . . shall be deemed to be the erection of a new building."

took place between the parties on the subject in which the plaintiffs, maintaining that the by-law was bad for unreasonableness, intimated that they proposed to proceed with the work, and in fact they did so. On December 29, 1916, the defendants, acting under their by-law No. 57, served a notice calling upon the plaintiffs to show cause why the addition to the house should not be pulled down and removed, whereupon, after some further correspondence, the plaintiffs issued the writ in this action claiming an injunction restraining the defendants, their servants and agents, from pulling down, removing, or otherwise interfering with the addition to the house.

Bailhache J. held that by-law 12 was unreasonable and bad and he granted the injunction.

The defendants appealed.

Talbot, K.C., and *Hon. M. M. Macnaghten*, for the defendants. By-law No. 12 is applicable only where the subject-matter admits of its application, and when so read it is valid. In the notes to s. 23 of the Public Health Acts Amendment Act, 1907, in Lumley's Public Health Acts, 8th ed., vol. 1, p. 1110, it is stated that "the effect of the section is that such of the building by-laws in force in the district as may be applicable will apply where any of the works enumerated in the section are contemplated." The section is a definition section and may or may not be applicable according to the subject-matter. It is obviously inapplicable to some "new buildings," such as a porch or bow window or a projecting buttress constructed in an existing building. The provisions of s. 39, sub-s. 2, of the Act of 1907 are obviously inapplicable to such a building. It applies where the context or the subject-matter of any by-law is not inconsistent with its application: see per Channell J. in *Collins* v. *Greenwood*. (1) By-law No. 1 defines "domestic building" as (inter alia) a dwelling-house, and "dwelling house" is defined as meaning "a building used or constructed or adapted to be used wholly or principally for human habitation." This three-storey building is a domestic building within that definition, and it is a "new domestic building." Even before the Act of 1907 this addition to the house would have been a new building, and this

(1) (1910) 103 L. T. 36, 38.

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by-law would have applied to this building as a "new building"; it was then a question of fact in each case whether a building was a "new building": *Shiel* v. *Sunderland Corporation* (1); *James* v. *Wyvill.* ( ) But whether this addition would or would not have been a new building is immaterial. Sect. 23 of the Act of 1907 was passed to do away with any such question, and to define clearly what is a new building. The object of by-law No. 12 is to prevent houses being built back to back, and it does not apply where the new building has no rear, that is, no external surface at the rear thereof. The Court should construe a by-law of a local authority as valid if it is possible to do so: *Slattery* v. *Naylor* (3); *Kruse* v. *Johnson.* (4) [*Rex* v. *Preston Rural Council* (5) was also referred to.]

Hudson, K.C., and *Inman*, for the plaintiffs. By s. 23 of the Public Health Acts Amendment Act, 1907, certain additions to or alterations of old buildings are to be deemed to be the erection of new buildings. A by-law framed so as to apply to a new domestic building before the Act may well be unreasonable when applied to a new domestic building as defined by the Act. It is impossible to have the air space required by by-law 12 at the rear of a bow window or a porch or a frontal addition to a house. A by-law which prevents an addition, otherwise harmless, being made to a house is unreasonable. In many cases it would be impossible to provide an open space in the rear of a new domestic building "exclusively belonging to such building": see per Martin B. in *Shiel* v. *Sunderland Corporation.* (6) In truth, since the Act of 1907 this by-law has become unreasonable and requires amendment: per Avory J., in *Leonard* v. *Hoare & Co.* (7) That observation of Avory J. is not affected by the fact that the Court of Appeal in *Rex* v. *Foot's Cray Urban Council* (8) overruled the decision. [*Strickland* v. *Hayes* (9) and *Rossi* v. *Edinburgh Corporation* (10) were also referred to.]

Hon. M. M. Macnaghten in reply.

Cur. adv. vult.

(1) (1861) 6 H. & N. 796, 806.
(2) (1884) 51 L. T. 237, 240; 48 J. P. 725, 726.
(3) (1888) 13 App. Cas. 446, 453.
(4) [1898] 2 Q. B. 91, 99.
(5) (1911) 106 L. T. 37.
(6) 6 H. & N. 805.
(7) [1914] 2 K. B. 798, 802.
(8) [1916] 1 K. B. 246.
(9) [1896] 1 Q. B. 290.
(10) [1905] A. C. 21.

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May 3. PICKFORD L.J. read the following judgment:—In this case the plaintiffs made additions to one of the masters' houses. They added a bay window and servants' hall of one storey and a three-storey addition at one side with one room on each storey. It was also stated that they added a porch; but, looking at the plans, I think that is doubtful. If the porch were added the same considerations apply to it as to the bay window. The plaintiffs did not at first submit any plans to the defendants, but after a time plans were submitted. The defendants refused to approve the plans because they did not comply with by-law 12, which is in these terms: [The Lord Justice read clause 1 of the by-law.] They only sought to compel the plaintiffs to comply with the requirements of this by-law so far as the three-storey addition was concerned, and in the argument before us it was admitted that the bay window and the porch were of such a nature that it was not possible to comply with the requirements. In other respects there was no objection to the plans.

The plaintiffs maintained that the by-law was bad for unreasonableness, and stated their intention of continuing the work, which they did. The defendants then served a notice on the plaintiffs under by-law 57 calling upon them to show cause why the addition should not be demolished, and the plaintiffs began this action claiming an injunction to restrain the defendants from interfering with it. Bailhache J. granted the injunction on the ground that the by-law was unreasonable, and the defendants appealed.

It is an important case, because it affects a very great number of by-laws throughout the country. I quite agree that by-laws, especially those of public bodies, should be approached from the point of view of upholding them, if possible, and should be, as it has been described, benevolently interpreted; but still they must be reasonable. I think Bailhache J. has stated the considerations to be applied quite accurately as follows (4): "One may certainly add this—that if the effect in a given case, which might be of frequent occurrence, of construing a by-law in a particular way would lead to a result quite unnecessary for the protection of the public health, and would impose a serious restriction upon the ordinary rights of a property owner with no good object, I think

(1) [1918] 1 K. B. 30.

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one would be entitled to say that the by-law was void because it was unreasonable. One must of course be careful to see that the result is such as no one would desire, and would in itself be absurd, but if it is found to be so, than I think one is entitled, and indeed bound, to say that such a by-law is bad for unreasonableness."

The question is not whether it is possible in some particular cases to find a use of the by-law which is reasonable, but whether the by-law itself looked at in the light of all the cases to which it applies is so vague or so unreasonable as to be invalid. There are, however, here, in my opinion, grounds for contending that even as applied to the three-storey addition the by-law is unreasonable. The difficulty arises in a great measure from the fact that the by-law is one of a set of model by-laws framed in view of the meaning of new building in the Public Health Act, 1875, and now applied to the much extended meaning of those words as defined by the Public Health Acts Amendment Act, 1907. It does not seem to me to be material that the by-law was in existence at the time of the passing of the Public Health Acts Amendment Act, 1907. As the local authority allowed it to continue without alteration after the passing of the Act, I think it must be considered from the same point of view as if it had been made after the Act was passed. It seems to have been quite appropriate to the state of things existing under the Act of 1875. Under that Act an alteration of an existing building might be of such a nature that the result was to make the altered thing a new building, and it is possible that there might be an addition so complete and self-contained as to be itself a new building though connected with one previously existing. In either case the by-law providing for ventilation space was quite reasonable, and if the new building from its position relatively to the building owner's boundary or to other buildings or from any other cause were such that it was not possible to comply with the requirements of the by-law, the building could not be built except at the risk of being demolished. Such an addition as that of the three rooms in this case would not have been a new building under that Act, nor would the addition of the bay window or porch or servants' hall. This is, I think, clearly decided by *Shiel* v. *Sunderland Corporation* (1), more fully reported in the *Law Journal* Reports. (2) But by the

(1) 6 H. & N. 796. (2) 30 L. J. (M.C.) 215.

Public Health Acts Amendment Act, 1907, s. 23, every one of these additions is of itself a new building for the purposes of by-laws made under the Public Health Acts; and, therefore, this by-law 12, as well as by-laws 11, 13, and 57, applies to them unless there is something in the Act or the by-laws to prevent such application. It is clear that in the case of a bay window or a porch or many other instances which were mentioned in the argument the very nature of the addition made it impossible for the owner to comply with the requirements of the by-law as to space at the rear, and therefore there was in effect a prohibition against any such additions being made. I think that a by-law which prohibits additions of this kind, where no good object could be served by doing so, because it contains requirements framed for other purposes and inapplicable to these circumstances, is so unreasonable as to be invalid. I do not think this was very seriously contested by the appellants; but it was argued by them that such a result did not follow from the existence of the statute and the by-law because one or other or both must be read as containing an implied condition or qualification which restricts the application of the by-law to cases where it is reasonable to apply it. The definition in the Act and the by-law are both positive in their terms; all these additions are declared to be new buildings for the purposes of by-laws, and the by-law imposes requirements upon all new buildings.

But it is argued, first, that the definition must be read as containing such a qualification as that contained in the by-laws in *Collins* v. *Greenwood* (1), where Channell J. says: "We have only to apply this definition to cases"—he is speaking of the definition contained in the by-law there—"where it is neither inconsistent with nor repugnant to the context or the subject-matter." I think such a qualification would not avail the appellants. There may well be an implication that a definition shall not conflict with other parts of the same document which contains it. That only means that the whole document must be read together, but here the appellants wish to introduce an implication that the definition shall be governed by the by-law. In substance they contend that the definition shall be read: These additions for the purpose of by-laws shall be new buildings unless the nature of

(1) 103 L. T. 38.

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the additions is such as to preclude the building owner from fulfilling the requirements of the by-law. I do not think that there is any such implication.

It was also argued that the by-law should be read as containing an implied term which would prevent its application to such cases as I have mentioned. I had the greatest difficulty in following the exact term which it was said should be implied; one or two were suggested that might meet the particular case of a bay window or a porch, but would not meet other possible cases which were suggested, and in whatever form it were put it must, in order to effect what the appellants wished, amount to a proviso that the by-law should not apply to any addition of such a nature as to preclude the reasonable possibility of fulfilling the requirements of the by-law. I am inclined to think that such an implication, if it existed, would make the by-law so vague as to be invalid, but I am of opinion that no such term can be implied.

The result is that I think this by-law applies to all additions which are new buildings as defined by the Public Health Acts Amendment Act, 1907; and, as applied to such additions, it is so unreasonable as to be ultra vires.

I come to this conclusion with regret, as the by-law is one which deals with a very important subject relating to air space and ventilation, and I think that a by-law of a public authority should be supported when possible. It may be that the framers of the Public Health Acts Amendment Act, 1907, did not consider the effect of the new definition on the old by-law, or they may have relied upon local authorities making any necessary amendments in their by-laws. There is power to make such amendments, and I see no reason why this by-law should not be amended in such a way as to secure its object.

The appeal must be dismissed with costs.

WARRINGTON L.J. read the following judgment:—The question in this case is whether a certain by-law made by the defendants in exercise of the powers conferred upon them by s. 157 of the Public Health Act, 1875, is unreasonable. The contention of the plaintiffs is that, though it may have been reasonable when adopted by the defendants, the effect of s. 23 of the Public Health Acts Amendment

Act, 1907, has been to render it unreasonable. Bailhache J. has adopted this view, and has made an order in effect restraining the defendants from enforcing the by-law. The defendants appeal.

The by-law in question is No. 12 (1.): [The Lord Justice read it.] Before 1907 questions had arisen as to the application of the Act and the by-laws in cases where considerable additions were proposed to be made to existing domestic buildings, and apparently with a view to remove the difficulty and to widen the scope of the Act and by-laws so as to make them applicable to additions to existing buildings, in the Act of 1907 was inserted s. 23, the material part of which is as follows: "For the purposes of this Act and the Public Health Acts, and any bye-laws made thereunder, each of the following operations, namely"—omitting immaterial words—"(*d*) the making of any addition to an existing building by raising any part of the roof, by altering a wall, or making any projection from the building, but so far as regards the addition only . . . . shall be deemed to be the erection of a new building."

In the year 1916 the plaintiffs were desirous of making certain alterations in and additions to one of their school boarding-houses. One of the additions consisted of a building three storeys high containing one room on each floor at the side of the house. The building fronted on a street and was at a corner, so that its side opposite to the point of contact with the old building was also open to a street. It had windows in the front and side walls, but not in the rear wall. The defendants insisted on the provision of an open space in the rear in accordance with the by-law No. 12. The plaintiffs were unable to provide such open space, and, insisting that the by-law was unreasonable, proceeded with their building in spite of the disallowance of their plans by the defendants, and the latter thereupon threatened to have the building pulled down. This action was commenced to restrain them from so doing. Is the by-law under existing circumstances unreasonable?

I realize that it is the duty of the Court to uphold a by-law if on a fair construction it can hold it to be reasonable: see *Kruse* v. *Johnson* (1) and the judgment of Lord Alverstone C.J. in *Collins* v. *Greenwood*. (2) I also agree that for the purpose of construing a document such as an Act of Parliament or a set of by-laws which

(1) [1898] 2 Q. B. 91, 99. (2) 103 L. T. 38.

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contains a definition clause it is right to read into the latter some such words as "unless the context otherwise requires," unless they are there already. This is obviously necessary, inasmuch as without such a qualification of the definition clause two parts of the same document might be contradictory of each other—one by context showing clearly that a word has such and such a meaning and the definition clause giving it a different meaning. This last principle, however, seems to me not to apply to a case where the definition clause is in one document, and the clause affected by it is in another, which, like the by-laws, can be altered to fit the definition; for in such a case it may be that the framers of the definition clause intended it to be unqualified and contemplated the harmonizing with it by amendment of the provisions of the other document. I think, therefore, one must since the Act of 1907 read the by-law as providing that every person who shall erect a new domestic building or make any addition to an existing building shall provide in the rear of such building or addition such an open space as is there described. It is obvious that so read it would render impossible the making of certain additions to which there could be no reasonable objection. Bailhache J. has mentioned one, but the present case affords a clear and simple example. Among the alterations proposed by the plaintiffs were a porch and a bay window in the front of the existing house; for neither of these could an open space be provided in the rear thereof without pulling down the house itself; the effect of the by-law would be to prevent the making of such an alteration altogether. Again, suppose a house with an extensive roof, upon the front portion of which it is proposed to construct new rooms, some looking to the front of the house, some to the rear. There may be miles of open space in the rear of the new windows, yet the by-law would prevent the erection of the rooms, because without pulling down the rear part of the existing house there could be no open space free from an erection above the level of the ground.

An attempt was made, in my opinion unsuccessfully, to read the by-law as confined to an erection having what I may call an unobstructed rear. But, even if this is done, though it might remove the difficulty in the case of the porch or the bay window, it would still leave the case last mentioned in which the building in question is open to the rear. The truth is the effect of the Act

of Parliament is to make the by-law wider in its application than was contemplated by its authors. This widening of its scope renders it unreasonable, and, in my opinion, it cannot by any possible device of construction be again so narrowed as to make it reasonable.

In my judgment the appeal fails and must be dismissed.

SCRUTTON L.J. read the following judgment:—This is an appeal by the rural district council of Repton from a decision of Bailhache J. holding their 12th by-law, which is founded on a model by-law of the Local Government Board, unreasonable and invalid.

The question is one which affects many similar by-laws throughout the country, and arises in this way: The governors of Repton School were altering one of the masters' houses by making certain additions which appear on the plans before us, and include the throwing out of (1.) a bow window; (2.) a porch, in front; at the back (3.) a one-storey servants' hall; at the side (4.) a three-storey addition with one room on each storey. It had not, apparently, been the habit of the governors to submit any plans to the district council at all, and they started building without any approval of plans. When they were required to submit plans they did so; the rural district council disapproved them on the ground that the addition (No. 4) had not at its rear sufficient air space to comply with by-law No. 12. The governors proceeded in spite of the disapproval; the council threatened to pull the building down, and the governors applied for an injunction to restrain them, which the judge granted on the ground that by-law 12 was void for unreasonableness.

There is no doubt that up to 1907 the by-law was a good by-law. Up to that time whether an addition to or modification of an old building was a "new building" was decided partly by the statutory rule contained in s. 159 of the Act of 1875, whereby certain modifications of old buildings were to be considered "new buildings," and, where that statutory rule did not apply, as a question of fact and degree depending on how much was new and how much old: *James* v. *Wyvill*. (1) But the building which was an old or a new building was the whole building with the addition. The addition was not a

(1) 51 L. T. 237; 48 J. P. 725.

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new building by itself; and any by-law as to a "new building" was applied, not to the addition by itself, but to the composite building, old and new, if the addition was so great as to make it a new building. This clearly appears from the decision in *Shiel* v. *Sunderland Corporation* (1), a decision under similar words in an earlier Act and by-laws, which is best reported in the *Law Journal*. (2) But it was thought that to leave the question of old or new building as a question of fact in this way was unsatisfactory. The London Building Acts (Amendment) Act, 1905 (5 Edw. 7, c. ccix.), s. 6, solved the question by providing that a building was new if at least half of it was new; but old if the proportion of new to old was less than a half. In the rest of the country a different solution was adopted. The Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), by s. 23 provided that for the purpose of the Public Health Acts, "and any bye-laws made thereunder," each of the following operations . . . . "shall be deemed to be the erection of a new building:" "(*d*) the making of any addition to an existing building by raising any part of the roof, by altering a wall, or making any projection from the building, but so far as regards the addition only." This expressly provides that only the raised part, the alteration, or the projection is to be the new building, which is to comply with the by-laws. A similar provision was implied by the Court of Appeal in the rest of the section in *Rex* v. *Foot's Cray Urban Council* (3), where it was held that if you pulled down and re-erected the wall of an old building you did not therefore make the whole building, old and new, a new building subject to by-laws, but only the part you rebuilt.

A very serious question was at once raised as to whether by-laws, which were reasonable when applied to the whole building, were reasonable when applied to an addition only. For instance, the by-law in question in this case requires in the rear of a new building an open space of 150 square feet "exclusively belonging to such building . . . . free from any erection thereon above the level of the ground." Part of the roof is raised, leaving the back part of the roof of the old building at its old level. This raised part only is a new building under the Act of 1907; how can a space exclusively

(1) 6 H. & N. 796. (2) 30 L. J. (M.C.) 215.
(3) [1916] 1 K. B. 246.

belonging to it and free from erections above the level of the ground be provided in its rear? The old building is in its rear, and the space there is the rear space of the old building. Again, an internal wall is altered by cutting holes, inserting girders, and rebuilding in part. The alteration is apparently a "new building" under the Act of 1907; how can it have an exclusive and unbuilt on space in its rear? The same problem arises with the alteration of a side wall. A projecting bow window or porch in the front of the house gives rise to equal puzzles, and counsel hesitated whether to say its front was its rear, or that it had no rear at all. Two new and separate bow windows projecting within five feet of each other at the side of the house, a condition I am personally acquainted with, may be suggested as a test of ingenious interpretation. The truth is that the by-law was not really applicable to the conditions as altered by the Act of 1907, unless some implication could be made which would exclude a number of matters from its scope. It was suggested at one time that the Court might imply the term "unless the context of a particular by-law and the nature of the erection otherwise require." But the Act applies to "any by-law," and I know of no authority for making such an implication in the plain words of an Act, an implication which besides, if made, would leave the whole question of new buildings in greater darkness than before. If the implication was to be made in the by-law, the revised form of the implication which counsel at last evolved after many struggles was that the by-law should not apply to a "new building which had no external surface at the rear thereof"; but this was obviously redrafting or new legislation and not implication, and did not meet many of the suggested difficulties. The real implication was that the Act should not apply to any by-law which, if it did apply, would become unreasonable or absurd in its operation. The truth is the by-law must be considered as if it were re-issued after the Act of 1907; so considered, while I am quite ready to give it a benevolent construction that it may be valid if possible, I see no way of giving it a reasonable operation. The effect of the Act of 1907 was, in my opinion, clearly to require the revision of by-laws 11 and 12, and possibly 13 and 14, to make them reasonably applicable to the "new buildings" brought into existence by Parliament. This has not been done, and as to apply by-law 12 to these

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parliamentary new buildings is, in my opinion, unworkable and unreasonable, I think by-law 12, as it now stands, has become void.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Ullithorne, Currey & Co., for Barber, Currey & Currey, Derby.*

Solicitors for defendants: *Bridges, Sawtell & Co., for Lowe & Auden, Burton-on-Trent.*

W. F. B.

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[IN THE COURT OF APPEAL.]

In re AN ARBITRATION BETWEEN NOTT AND THE CORPORATION OF CARDIFF.

Contract—Building Contract—Construction of Reservoir—Extras—Written Order of Engineer—Condition precedent—Disputes as to Extras arising under Contract—Reference to Arbitration—Power of Arbitrator to dispense with written Order — Railway — Rates—Occupation.

A contractor entered into a contract with a municipal corporation to construct a reservoir at a fixed price in accordance with a specification. The work had to be done to the satisfaction of the corporation's engineer, with such additions, alterations, and variations as might from time to time be directed by the corporation or the engineer as provided by the specification. The price was to be paid against certificates given from time to time by the engineer. By a clause in the specification it was provided that the corporation were not to become liable for the payment of any charge for additions, alterations or deviations unless instructions for them were given in writing by the engineer. The specification also provided that in case any dispute should arise either during the progress of the works or after the determination of the contract as to the construction of the contract or as to any matter or thing arising thereunder, or as to any objection by the contractor to any certificate, finding, decision, requisition, or opinion of the engineer, such dispute was to be referred to the arbitration and final decision of a single arbitrator, and either party might demand an immediate determination of the dispute.

Disputes arose during the construction of the works as to requirements by the engineer for carrying out certain portions of the work in a particular manner and with certain materials, which the contractor contended were extras for which he was entitled to be paid in addition to the contract price. The engineer refused to give written orders for this work on the ground that the work

required was in accordance with the contract. The contractor carried out the work so ordered. The disputes were referred to an arbitrator who found that the requirements of the engineer were in excess of the work and materials which the contractor had undertaken to execute and supply, and that the engineer, in deciding against the claim of the contractor, did not act fairly or impartially but had no dishonest motive. He accordingly awarded the contractor a sum in respect of such extra work. Bray J. held that the award of the arbitrator took the place of the order in writing of the engineer:—

Held, on appeal, by Pickford L.J. and Neville J., (1.) that the arbitrator had only power to determine the rights of the parties in accordance with the contract; that a written order was a condition precedent to any claim by the contractor for payment for extra work; that the arbitrator had no power to dispense with the performance of the condition precedent; and that therefore he had no power to award any sum for extras. (2.) That the corporation were not debarred from relying upon the non-performance of the condition precedent, as they were not in the circumstances parties to a prevention of its performance.

Held, by Bankes L.J., that, looking at the contract in a reasonable and business manner, it was intended that whenever a dispute arose the arbitrator should have power to make an effective award; that the dispute included the question as to what the contractor was entitled to be paid for the extra work; and that the arbitrator had power to award a sum for that work.

The corporation were the owners of a railway which had been laid by them some time before for the construction of other portions of their waterworks undertaking, but which had become derelict. By a clause in the specification the contractor had to "take over" the railway and put it in repair and the contractor had to pay all wayleaves payable by the corporation to landowners over whose land the railway was constructed. There was no provision as to the payment of rates on the railway. The rating authorities rated the contractor as the occupier of the railway, and while disputing his liability he paid the rates and claimed to recover them from the corporation. The dispute was referred to arbitration, and the arbitrator found that the contractor was not the occupier of the railway and that the corporation were bound to repay to him the rates which he had been compelled to pay in order to prevent a distress being levied. Bray J. affirmed the decision of the arbitrator:—

Held, on appeal, that there was no implied undertaking by the corporation to repay to the contractor the rates so paid by him as the rated occupier of the railway.

APPEAL from the judgment of Bray J. upon an award in the form of a special case.

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NOTT AND CARDIFF CORPORATION, *In re.*

By a contract dated November 28, 1910, and made between L. P. Nott (called the contractor) and the corporation of Cardiff the contractor agreed to construct an impounding reservoir, in the Taff Fawr Valley, the work to be completed by December 31, 1916. By clause 1 of the contract, "'Works' include all the works, matters, materials, and things hereby agreed to be done and supplied respectively by the contractor." By clause 2 the contractor agreed to execute and complete the works required for the construction of the reservoir in accordance with the specification under the direction and to the satisfaction of the corporation's engineer, with such additions, alterations, and variations as might from time to time be directed by the corporation or the engineer as provided by the specification. Clause 7: "The contractor shall conform to the provisions of any Acts of Parliament relating to the works and to the regulations and by-laws of any local authority and shall before making any variation from the drawings and specifications that may be necessitated by so conforming give to the engineer written notice specifying the variation proposed to be made and the reason for making it and apply for written instructions thereon. In case the contractor shall not in due course receive such written instructions he shall proceed with the work conforming to the provisions regulations or by-laws in question, and any variation so necessitated shall be dealt with under clauses 4 and 5 of the said specification. The contractor shall give all notices required by the said Acts regulations or by-laws to be given to any local authority and pay all fees payable to any such authority or to any public officer in respect of the works." By clause 15 the contract price was to be 201,077*l.* 7*s.* 4*d.*, "which shall be paid . . . . against certificates to be from time to time given by the engineer after adding thereto or deducting therefrom, as the case may require, such sum or sums of money (if any) as shall be determined by the engineer to be reasonable in respect of any alterations, omissions, additions, or variations in the works. . . . ." Clause 22: "It is hereby agreed that the second part of the arbitration clause 128 of the specification is intended and shall, except as thereby excepted, be held to override the arbitration provision given to the engineer by the first paragraph thereof."

At the beginning of the specification there was a "Special

Notice," clause 3 of which was as follows: "It must be distinctly understood that the whole of the conditions of the specification are intended to be strictly enforced, and that no extra charges in respect of extra work or works will be allowed unless they are clearly outside the spirit and meaning of the specification, nor unless such works shall have been ordered in writing by the engineer. All such claims shall be made when the monthly measurements are taken, and clearly and accurately set out in such manner as shall be prescribed. Any instructions given verbally are to be deemed as instructions for the proper execution of the works, *not involving extra charges.*" Clause 5 provided that for the protection of the corporation against any claims which the engineer might consider unreasonable the contractor might be called upon at each monthly measurement, and before any certificate was paid, to sign a statement that due regard had been given to all extras, and allowance made therefor, to which the contractor was entitled. Clause 4 (in the body of the specification): "No additions, deductions, alterations, substitutions or deviations made or permitted in to or from the construction of the said works or any of them shall anul or invalidate the contract entered into by the contractor, but the value of the same (if any) shall be ascertained (and be added to or deducted from the amount of the contract as the case may require) by and according to the judgment of and the admeasurements and valuations to be made by the engineer, who in making such valuations shall use or take into consideration the prices for analogous construction mentioned in the bill of quantities, or in the supplementary schedule appended to the tender made by the contractor, so far (but so far only) as such prices shall, in the opinion of the engineer, be applicable thereto. . . . ." Clause 5: "The engineer shall have full power and authority from time to time and at all times, by himself and the resident engineer, clerk of the works, assistant, or inspector for the time being, to make and issue such further drawings, and to give such further instructions as may appear to him or them necessary or proper for the guidance of the contractor, and the good and sufficient execution of the works, according to the true intent and meaning thereof, and as fully and effectually as though they had accompanied or had been mentioned or referred to in this specification; and the engineer may also . . . . order any further and other

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works not contemplated by this specification or the contract, or order any of the works contemplated thereby to be omitted . . . . and for the purpose of preventing doubts, disputes and litigation, it is to be distinctly understood that the corporation shall not become liable to the payment of any charge in respect of any such additions, alterations, or deviations unless the instruction for the performance of the same shall have been given *in writing* by the engineer, nor unless such instructions shall have distinctly stated that the matter thereof is to be the subject of an extra or varied charge, nor unless the claim therefor shall have been made in writing by the contractor . . . . *within fourteen days of the time at which such work was executed*, and such materials were used and before the same had been placed out of view or beyond check or admeasurement, nor unless the value of any altered or varied works, or any further works, shall, whenever practicable, have been determined and settled before such altered, or varied, or further works shall have been commenced, such value in case of dispute to be ascertained and fixed by the engineer, who shall determine in all cases whether such previous agreement was practicable or not, and in all cases where he shall consider the same to have been practicable the contractor shall not be entitled to make any claim in respect of any such altered, or varied, or further works, unless such previous agreement was made, and if it shall in any special instance become necessary to execute any additional or substituted work, either wholly or in part 'by the day' the claim therefor shall not be recognised unless the contractor shall deliver to the resident engineer or assistant within one lawful day, and so from day to day, a true and exact list of the names, occupations, time and wages of the several workmen. . . . ." Clause 13: "The sums and prices mentioned and set forth in the tender of the contractor shall (subject to the conditions of this specification and of the contract entered into by the contractor) be the consideration, and shall be accepted by him in full satisfaction and discharge for all and every description of work mentioned therein, inclusive of all the contingencies and liabilities to which he is or may become liable under this specification and the contract, and in the drawings therein referred to or intended so to be, whether the same shall be incident or necessary to the ultimate completion of the works, or be required

only for the temporary purposes of the said works during the progress thereof, and that no claim or demand shall be made, set up, or preferred against the corporation by reason of any alleged or supposed variations or additions, or otherwise howsoever, unless the same shall have been ordered and claimed in manner herein directed, and shall also in the opinion of the engineer be 'other than original contract work,' as intended by this specification." Clause 81: "The contractor shall do and perform his contract in all its parts according to the true intent and meaning of this specification, and of the drawings referred to therein, and of the further drawings instructions and directions which he may from time to time receive from the engineer, resident engineer, assistant or inspector, who shall, and each and every one of them shall, have full right, power, and liberty from time to time, and at all times, to inspect and examine the plant, materials and workmanship, and who shall and may at any time and every such time reject, cause to be destroyed, altered, or pulled down any or all of the plant, materials, or workmanship which to them, or any or either of them, may seem defective or unfit or improper for the several purposes to which they are applied or intended to be applied, or not in accordance with the description mentioned in or intended by this specification, or the said drawings, instructions, or directions respectively. Nevertheless in case of dispute or difference between the contractor and the resident engineer or assistant in regard to any of the matters aforesaid, the engineer shall in virtue of his office decide and determine the same with or without reference to the parties, and either by letter, verbal message or oral communication." Clause 124 provided that payments would be made on certificates of the engineer, and that "no certificate shall create liability in the corporation to pay for alterations or additions not ordered in writing by the engineer." It also contained the following proviso: "Provided always that with respect to all *admitted and adjusted claims* made in pursuance of the *fifth clause* of this specification, the contractor shall be entitled to be *paid in full*, and with respect to any disputed or unadjusted claim or claims made or alleged to be made in pursuance of such clause or otherwise, the contractor shall not be entitled before the final settlement of the contract *to any payment on account or otherwise* unless and until the engineer shall certify

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the correct amount of such claim or claims, nor unless and until the contractor shall give a receipt in full for and in respect of any moneys paid to him in discharge thereof." Clause 128: "Notwithstanding the position and duties of the engineer in relation to this contract, it is expressly agreed between the contractor and the corporation, that in case of any doubts, disputes, or difference arising or happening touching or concerning the works to be executed by the said contractor or any of such works either with regard to the construction or effect of the contract or the specification or its meaning or intent, or the drawings, or quantities, or as to any materials or workmanship, or as to any cause of difference, or any other matter or thing, or as to the mode of measuring the works on the computation of or payment for the same, shall from time to time be referred to and left to the sole arbitration and decision of the engineer, and his decision shall be final and binding on all parties. In case any dispute or difference shall arise between the corporation, or the engineer on their behalf, and the contractor, either during the progress of the works or after the determination, abandonment, or breach of the contract, as to the construction of the contract, or as to any matter or thing arising thereunder (except as to the giving or withholding of any consent under clause 88, or as to any matter arising under clauses 9, 85, 89, 91, 94, 103, 116 and 126, all which excepted matters shall be in the absolute and final discretion of the engineer), or as to any objection by the contractor to any certificate, finding, decision, requisition, or opinion of the engineer (except as aforesaid) then either party shall forthwith give to the other notice of such dispute or difference, and such dispute or difference shall be referred to the arbitration and final decision of a single arbitrator, to be agreed upon by the corporation and the contractor. If either party desire to have such dispute or difference determined forthwith, such party shall give written notice to that effect to the other party, and the arbitrator shall, with the consent in writing of the other party, proceed with the arbitration. In the event of the other party failing within seven days of such notice to give to the first named party an assent in writing to the immediate determination of such dispute or difference, the arbitrator shall, after written notice to the non-assenting party of a time and place of hearing, decide whether such dispute

or difference shall be immediately determined, or whether such determination shall await the completion or alleged completion of the work, and the same shall be determined at such time or times as the arbitrator shall decide. . . . ."

Clause 82 dealt with a railway which had been made by the corporation some time before the date of the present contract for the purpose of the construction of another reservoir, and had become practically derelict. It provided: "The contractor shall take over the existing railway, viaduct, sidings, and other works connected therewith from the point at which it joins the Merthyr and Brecon line at Cefn up to the terminus thereof at or near Pont-ar-daf; he shall conclude all arrangements with the railway company for making good between the company's line and the corporation railway. He shall pay all charges in connection therewith, and such further charges as may be made from time to time for keeping the same in proper working order and repair. Immediately after the contract is decided, and on receipt of the order from the engineer, he shall proceed to put the whole of the line from Cefn to Pont-ar-daf into efficient and good repair, including the viaduct near Cefn, with all other sidings and works, and shall keep the same in thorough working order throughout, during the continuance of the contract, and until the final completion thereof. . . . . The contractor will be held responsible for the efficient working of the traffic upon the line, and he shall convey any goods or materials other than those used in the performance of the contract for the corporation from Cefn to any point of the said railway when requested by the engineer at a fixed rate per ton as per supplementary schedule. The contractor will be held solely responsible for any accident which may occur about or in connection with the railway, whether the same be caused by negligence or otherwise. The contractor will be required to pay all wayleaves in connection with the railway and sidings during the continuance of the contract; these existing wayleaves are duly set out in schedule B; and if any further wayleaves or charges are made the contractor will be called upon to defray the same."

The railway was constructed partly on land belonging to persons other than the corporation, who granted wayleaves. Schedule B stated that the corporation had entered into certain agreements

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for the payment of wayleaves for the railway, and the contractor would, until the contract was completed, be held liable therefor and must keep all covenants connected therewith. Eight wayleaves were specified, the only material one being "No. 4. Col. Vaughan Lee 115*l*. Landlord compensates tenants." The agreement with Colonel Vaughan Lee was not in fact signed until some months after the date of the contract between the contractor and the corporation, and the corporation agreed with Colonel Vaughan Lee to pay the rates in respect of the railway. Other clauses of the specification are referred to in the special case.

Disputes arose under the contract during the construction of the works in respect of the payment of rates on the railway, and in connection with work required by the engineer or his assistants to be done, as stated in the special case herein, which the contractor alleged was extra work, but for which no order in writing was given. The disputes were referred under clause 128 of the contract to an arbitrator, and a list of claims by the contractor was made up to September 30, 1914. The arbitrator made his award in the form of a special case. The material claims were numbered as follows: Claim 1 related to the rates on the railway, and claims 2, 3, 4, 5, 7, 11, 13, and 17 to the work which the engineer or his assistants required to be done. The special case so far as material was as follows:—

2. Disputes arose between the contractor and the engineer at an early stage of the works and continued, more or less, up to the date when the arbitrator commenced the hearing of the reference, namely, July 19, 1915. At that date the works were not completed. Such disputes (excepting the dispute as to claim No. 1) arose wholly or mainly, as hereinafter appears, out of the objections by the contractor to the findings, decisions, requisitions and opinions of the engineer as to the work to be executed and the materials to be supplied in and for the execution of the works and as to the method of executing the same.

4. In respect of claim No. 1. The arbitrator found as follows:—

(*a*) The contractor was required by clause 82 of the specification to take over the existing railway, sidings, and all other works connected therewith. Such railway ran from the point at which it joins the Merthyr and Brecon line at Cefn up to the terminus thereof

at or near Pont-ar-daf. In that distance it crossed the site of the works and lands of Colonel Vaughan Lee and other owners to whom the contractor was under an obligation by clause 82 to pay the wayleaves set out in schedule B of the specification. The repair and maintenance of the railway formed part of "the works" as defined by clause 1 of the contract, and the use of the railway, sidings, and other works connected therewith was essential to the contractor in and for the execution of the works in the contract.

(*b*) The execution of the works could not be begun for any useful purpose until the contractor had put that part of the railway from Cefn to the site of the reservoir in good and efficient working order, and by clause 16 of the specification it was provided that the plant, materials, and machinery were to be placed on the site after the line to the site of the reservoir had been so put in working order, and that the contractor should then proceed with the works.

(*c*) The railway was also essential to the contractor for the purpose of drawing from Sychpant quarry at Cefn the stone specified to be supplied from that quarry (clause 17 of the specification), for which supply arrangements had been made by the corporation.

(*d*) The railway belonged to the corporation and had been constructed by them for other portions of their waterworks undertaking.

(*e*) Subsequent to the date of the contract, namely, on April 12, 1911, the corporation entered into an agreement with Colonel Vaughan Lee under which the corporation were allowed to maintain and use the railway and sidings already constructed to the lands of Colonel Vaughan Lee in consideration of the payment of a rent of 75*l.* and 40*l.* as and by way of tenants' compensation per annum, making a total of 115*l.* per annum, the sum mentioned in schedule B in respect of wayleaves. The corporation further in the agreement mentioned agreed to pay "all rates, taxes, and assessments whatsoever which shall from time to time be charged, assessed, or imposed upon the said premises, or upon the owners or occupiers thereof, by authority of Parliament or otherwise, except the landlord's property tax" on the rent of 75*l.*

(*g*) Shortly after the contractor commenced using the railway the rating authorities of the parishes in which the railway or part thereof was situate communicated with the corporation with

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reference to the payment of rates. The corporation thereupon referred them to the contractor for payment.

(*h*) The contractor was afterwards entered in the rate-book as the occupier of the railway. In May, 1911, the first demand note was served on him for payment of rates in respect of the railway, and the contractor communicated with the corporation and the engineer as to his liability therefor, but the corporation refused to pay the rates.

(*i*) In September, 1911, the contractor notified the engineer that he was about to appeal against the assessment of the railway in the interest of all parties and without prejudice to the question of his liability to discharge the rates in respect thereof. Subsequently the contractor was compelled to pay the rates owing to the refusal of the corporation to pay them, and in order to prevent the works being stopped, which they might have been if the rates had remained unpaid and the authorities had distrained. The contractor paid and continued to pay the rates, and gave notice to the corporation that he would dispute his liability to pay the same.

(*k*) No mention of rates or taxes appears to be made in the contract, nor in any of the documents therein referred to, and, when entering into the contract, the contractor did not know that he would be called upon to pay the said or any rates in respect of the railway and did not provide for payment of the same in the bill of quantities, one of the documents referred to in the contract.

(*l*) Subject to the opinion of the Court in so far as his finding was a question of law, the arbitrator found that the contractor was not the occupier of the railway within the meaning of the statute of Elizabeth, and further that there was an implied obligation on the part of the corporation in the contract that the contractor should have the use of the railway for the purposes of the execution of the works in the contract free of any payment of rates or other charges except as otherwise therein expressly provided.

(*m*) The rates on the railway were made by the proper authorities and amounted to 427*l.* 5*s.* up to September 30, 1914.

5. In respect of the performance of the contract generally the arbitrator found as follows :—

(*a*) The resident engineer, with the concurrence of the engineer,

improperly requested the contractor not to make claims for extra work under the provisions of clause 3 of the "Special Notice," in the specification, and the engineer did not call upon the contractor to sign a statement under the provisions of clause 5 of the "Special Notice," in order that the engineer might defer raising the question of extras with the corporation to "a more opportune time," and for the reasons aforesaid a certificate of the correct amount of the contractor's claims under the provisions of clause 124 of the specification was not required or given.

(*b*) The arbitrator was not informed whether "the more opportune time" in the last sub-paragraph mentioned had arrived, but at the hearing before him it was not disputed by the corporation that the contract sum had been exceeded by about 13,000*l*., and that in respect of that excess no extra orders had been given.

(*c*) The engineer was the permanent waterworks engineer of the corporation, and had been in their employ in that capacity for about twenty years. The works the subject of the contract were the first works of any magnitude which he had carried out entirely by contract, and in performing the duties required of him by the terms of the contract he failed to realize, or overlooked the fact, that, in so far as such duties consisted of the exercise by him of a discretion or decision which was expressed by the contract to be final or was judicial or quasi-judicial, he was under an obligation to act fairly and impartially and independently of any duties which he might otherwise owe to the corporation as their salaried official.

6. The arbitrator found in particular in respect of the claims numbered 2, 3, 4, 5, 7, 11, 13, and 17 in respect of which he had, as hereinafter appears, awarded more or less in favour of the contractor, generally as follows :—

(*a*) The engineer required the contractor, without extra payment, to execute work and supply materials in excess of the work and materials which the contractor had undertaken to execute and supply under the contract, and refused to allow the contractor to use materials in the execution of the works which were in accordance with the contract.

(*b*) The engineer permitted his subordinates, the resident engineer

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and inspectors, almost continuously throughout the execution of the works

(i.) to make excessive and unreasonable demands upon the contractor as to the methods by which the works and operations were to be carried out beyond the methods contemplated by the contract, and to insist upon compliance with such demands;

(ii.) to demand of the contractor a degree of precision in the execution of the works which was unusual, unnecessary, and unreasonable, and not contemplated by the contract, and to insist on compliance with such demand; and

(iii.) to refuse to allow the contractor to use materials in the execution of the works which were in accordance with the contract.

(*c*) The contractor objected to such requirements, refusals, and demands in paragraphs 6 (*a*) and (*b*) mentioned, and disputes thereupon arose which, as regards the disputes giving rise to claims numbered 2, 3, 4, 5, 7, and 11, were from time to time submitted by the contractor to the engineer for his decision. The engineer gave decisions against the contractor in respect of the said disputes giving rise to such claims, and the contractor disputed such decisions of which the engineer had notice. As regards the disputes giving rise to claim numbered 17, such disputes and the causes thereof were, notwithstanding the objections made to the engineer by the contractor, permitted by the engineer to continue and accumulate during the execution of the works; the engineer had ample but not formal notice of such disputes. As regards the disputes giving rise to claim numbered 13, the contractor protested to the resident engineer against his requirements and he refused to alter the same.

(*d*) The engineer, in making such requirements in excess of the work and materials which the contractor had undertaken to execute and supply under the contract, in refusing to allow the contractor to use materials which were in accordance with the contract, and in permitting the resident engineer and inspectors to make and insist upon the compliance with the unusual, unnecessary, excessive, and unreasonable demands in paragraph 6 (*b*) mentioned, and to refuse to allow the contractor to use materials which were in

accordance with the contract, and in deciding against the contractor in respect of such matters as he did decide, did not (without any dishonest motive) act fairly or impartially.

(*e*) In so far as such requirements, refusals, and demands would or did result in an addition to or an alteration or deviation of the works contemplated by the contract the engineer did not give instructions in writing within the provisions of clause 5 of the specification, and improperly withheld such instructions.

The requirements, refusals, and demands in paragraph 6 (*a*) and (*b*) mentioned delayed the carrying out of the works, and in consequence of such requirements, refusals, and demands and of such delay the contractor was put to additional expense beyond the expense to which he would have been put in carrying out the works in accordance with the contract.

The special case in paragraph 7 dealt with each of the claims 2, 3, 4, 5, 7, 11, 13 and 17. As to claim 2, the arbitrator found in clause (*a*) as follows :—(i.) The contractor agreed early in 1912 at the request of the employers and without extra payment to substitute Forest of Dean stone to be supplied by the United Stone Firms, Limited, for the limestone specified for pitching. (ii.) The contractor thereupon agreed with the United Stone Firms, Limited, for the supply and dressing of the said pitching, and the supply of the said pitching by the United Stone Firms, Limited, proceeded, but the engineer required an amount and kind of dressing in excess of the dressing specified, and rejected stones which were as well dressed as certain agreed sample stones. (iii.) On June 28, 1913, a receiver of the United Stone Firms, Limited, was appointed, who in consequence of the excessive requirements of the engineers refused to adopt the firms' agreement with the contractor unless an additional price was paid for the pitching. The contractor communicated to the engineer the position taken up by the receiver, and the engineer was at first willing to allow an additional price for the pitching dressed, as required by him in sub-paragraph (ii.) mentioned, but the employers interfered with the engineer, and the engineer refused to allow any additional price. (iv.) In order to satisfy the said excessive requirements of the engineer the contractor was put to additional expense in paying the company the extra price for the pitching. As to claim 3, the arbitrator stated that the

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specification provided for clay for the puddle wall equal to a sample either from Cyfarthfa or elsewhere. The sample was Cyfarthfa clay. The engineer refused to allow Neath clay to be used. In consequence the contractor was compelled to procure clay from Cyfarthfa at an additional expense. The arbitrator found that the Neath clay was equal in every respect to the sample. Claim 4 related to river gravel for the concrete, which the engineer refused to allow the contractor to use, but which the arbitrator found was fit and proper; claim 5 to the treatment of the surface of the concrete in a way not contemplated by the specification; claim 7 to the construction of the stonework of the pillar drains, which the arbitrator found the resident engineer had required to be done in an unnecessarily expensive manner contrary to the specification; claim 11 to the use of cement in the mixing of concrete, which the arbitrator found to be in excess of the proportion mentioned in the specification; claim 13 to a requirement that the stone toe of the embankments should be washed and wire-brushed before being laid; and claim 17 to expense caused by the unusual, unnecessary, excessive, and unreasonable demands of the resident engineer and inspectors, mentioned in paragraph 6 (*b*), which the engineer permitted, and the arbitrator found that the contractor had sufficiently complied with the provisions of clause 81 of the specification.

The arbitrator awarded payment by the corporation to the contractor of the sum of 12,360*l.* 18*s.* 2*d.*, being made up of 427*l.* 5*s.* for the claim for rates, and a specific sum for each of the other claims, subject to the opinion of the Court.

Bray J. held that the arbitrator was right in finding that the contractor was not the occupier of the railway, and that the corporation were bound to pay the rates; that it was the duty of the corporation to do all that was necessary to enable the contractor to have the full use of the railway free from interruption such as would be caused by their default in paying the rates, and the arbitrator had found that it was necessary for the contractor to pay the rates to avoid the works being stopped. The corporation were therefore bound to repay the amount to the contractor. He also held upon the other claims that the award of the arbitrator took the place of the order in writing of the engineer, and that the award must stand. The corporation appealed.

P. O. Lawrence, K.C., and *Holman Gregory, K.C.* (*Bruce Thomas* with them), for the appellants. With regard to the claim of the contractor to be repaid the rates which he paid in respect of the railway, by clause 82 of the specification the contractor had to "take over" the railway, viaduct, sidings, and other works connected therewith, and he was to pay all "charges" in connection therewith, and was to be responsible for any accident occurring thereon. "Charges" include rates. By clause 16 he had to put the railway into good and efficient working order, and by clause 82 he was to keep it in working order. By clause 83 he had to convey all the materials for the works by the railway at his own cost. By schedule B the contractor was liable for the payment for the wayleave in respect of the railway to Colonel Vaughan Lee and he had to keep all covenants connected therewith. By clause 17 the limestone used on the work was to be obtained from the Sychpant quarry at Cefn, and the contractor had "the use" of the quarry for that purpose. He "takes over" the railway and is given possession of it, but has only "the use" of the quarry; and by clause 82 he had to carry goods or materials for the corporation from Cefn to any point on the railway at a fixed rate per ton. Again, by clause 109 he has "the use" of certain land necessary to enable him to execute the works. The contractor is therefore in exclusive occupation of the railway and is liable for the rates, and the corporation have not agreed to indemnify him against them, nor can any such an agreement be implied. Bray J. relied upon certain clauses giving the corporation certain control over "the works," which he held included the railway, so as to show that they were in occupation of it. But the expression "the works" does not include the railway, and those clauses afford no foundation for the conclusion that the corporation had control of the railway. In *Rochdale Canal Co.* v. *Brewster* (1) the Mersey Docks and Harbour Board had such control over the berth and quay appropriated to the plaintiffs as to prevent the plaintiffs having exclusive occupation of them. On the other hand, in *Young & Co.* v. *Liverpool Assessment Committee* (2) the lessees of a warehouse from the Mersey Docks and Harbour Board were held to be in exclusive occupation and therefore rateable. Land may be occupied for the purpose of

(1) [1894] 2 Q. B. 852. (2) [1911] 2 K. B. 195.

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and in connection with the enjoyment of an easement in such a manner as to make the person so occupying liable to be rated: *Holywell Union* v. *Halkyn District Mines Drainage Co.* (1) Further, the contractor is rated in respect of the railway as the occupier, and as such is liable for the rates, his only remedy being by an appeal to quarter sessions.

Next, the award of the arbitrator does not take the place of the certificate of the engineer so as to allow the contractor to claim payment for extras. The order in writing of the engineer for extra works is, by clause 5 of the specification, a condition precedent to any claim for payment for extra work: *Russell* v. *Sa da Bandeira.* (2) The clause assumes that the order must be given before the work is begun. It states three conditions precedent: an order in writing, the price to be agreed upon, and the claim of the contractor for payment to be made within a certain time. Clause 128 of the specification gives an appeal to the arbitrator if there is any dispute as to extra work, but even if the arbitrator finds that it is an extra, the contractor must get the certificate of the engineer before he does the work and can claim payment. He need not do the work. The engineer must elect either to give a written order or not to have the work done. The arbitrator must decide according to the contract; he cannot make a new contract between the parties. The corporation can only contract under seal: *Lamprell* v. *Billericay Union.* (3) There is no term in the contract, express or implied, that the arbitrator can do away with the condition precedent of a written order of the engineer as required by clause 5. If the contractor thinks that an arbitration to settle a dispute as to whether certain work shall be done will delay the carrying out of the works generally, he can claim arbitration forthwith. Even if the engineer acted improperly, as stated in the award, this would not make the corporation liable, as they were not parties to the improper conduct. The learned judge was therefore wrong.

Upjohn, K.C., and *Walter, K.C.* (*Szlumper* with them), for the contractor. Upon the true construction of the contract as a practical business arrangement, when an appeal is given to an arbitrator from the decision of the engineer on the question of extras the arbitrator

(1) [1895] A. C. 117, 121. (2) (1862) 13 C. B. (N.S.) 149, 200-202.
(3) (1849) 3 Ex. 283.

is placed in the same position as the engineer. The Court must "give such business efficacy to the transaction as must have been intended at all events by both parties who are business men": *The Moorcock* (1); *Hamlyn & Co.* v. *Wood & Co.* (2) Clause 128 of the specification means, in regard to extra works, that if the arbitrator comes to the conclusion that the engineer is wrong he can give such orders as the engineer ought to have given. The award is always for a sum of money; not that the engineer shall give an order in writing or a certificate; and the award takes the place of the engineer's written order and certificate. By clause 113 the contractor is to complete the works on or before December 31, 1916, and deliver them in a sound condition to the corporation; and by clause 124 payment for the work done is to be made on the certificates of the engineer. If the engineer refuses his certificate, and the arbitrator comes to the conclusion that the works are in such a condition that the engineer ought to have given his certificate, and if he can only award that the engineer ought to have given his certificate, his award will be futile. The true view is that he can do what the engineer ought to have done. An arbitration clause is inserted in a contract like this in order to mitigate the harshness of the clause making payment of the price depend on the certificate of the engineer: per Lindley L.J. in *In re Hohenzollern Aktien Gesellschaft and City of London Contract Corporation.* (3) If it were necessary to hold arbitrations in cases of disputes before the work was done, such delay would be caused as to render the contract unworkable. [*Jackson* v. *Barry Ry. Co.* (4) was also referred to upon this point.]

Next, in the circumstances as found by the arbitrator the corporation are debarred from setting up the absence of a written order by the engineer: *M'Intosh* v. *Great Western Ry. Co.* (5); *Pawley* v. *Turnbull* (6); *Hill* v. *South Staffordshire Ry. Co.* (7); *Sharpe* v. *San Paulo Ry. Co.* (8); *Kellett* v. *New Mills Urban Council.* (9) The arbitrator has found in substance that the engineer

(1) (1889) 14 P. D. 64, 68.
(2) [1891] 2 Q. B. 488, 491.
(3) (1886) 2 Hudson's Building Contracts, 4th ed., 100, 109.
(4) [1893] 1 Ch. 238.
(5) (1848) 2 De G. & Sm. 758; (1850) 2 Mac. & G. 74.
(6) (1861) 3 Giff. 70.
(7) (1865) 12 L. T. 63, 65.
(8) (1873) L. R. 8 Ch. 597, 612.
(9) (1900) 2 Hudson's Building Contracts, 4th ed., 298.

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did not act "fairly or impartially" in the matter (paragraphs 5, 6 (*c*), (*d*) of the award), and in paragraph 7 (*a*) (iii.) he has found that the corporation "interfered with the engineer," who in consequence refused to allow any extra price in respect of certain stone pitching. The Court will not allow the corporation to set up the absence of a written order or of a certificate as a defence: *Hickman & Co.* v. *Roberts* (1), where Lord Loreburn L.C. quoted with approval the language of Fletcher Moulton L.J. in the Courts below (2): "He" (the architect) "is no longer fit to be a judge, because he has been acting in the interests of one of the parties, and by their direction. That taints the whole of his acts and makes them invalid." Lord Atkinson said (3) that the architect "had forfeited his independence as an arbitrator, and had allowed himself to be under the control or under the influence of the building owners"; and Lord Shaw said (4) that "the grant of a certificate cannot, in my judgment, be a condition precedent to a right to recover if the architect's conduct and judgment are controlled as stated." The corporation are affected by the conduct of their engineer, who is their agent.

Thirdly, the money is recoverable as damages for breach of contract, and the arbitrator has so awarded.

With regard to the rates, it is a question of fact whether the contractor or the corporation are the occupiers of the railway. The arbitrator has found that the contractor is not the occupier. The question does not depend upon whose name is on the rate-book. "The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title": per Lord Herschell L.C. in *Holywell Union* v. *Halkyn District Mines Drainage Co.* (5); and Lord Macnaghten in the same case says (6) that "liability to rates is not a matter of title." Rates are not "charges" within the contract. The contractor has, by clause 82 of the specification, agreed to pay all charges and wayleaves in connection with the railway, and if he had to pay the rates they would have been specifically mentioned.

(1) [1913] A. C. 229, 233.
(2) 2 Hudson's Building Contracts, 4th ed., 426, 448.
(3) [1913] A. C. 238.
(4) Ibid. 240.
(5) [1895] A. C. 125.
(6) Ibid. 127.

Either there is an implied term that the corporation would repay the contractor the amount of the rates paid by him, or the contractor was compelled to pay a debt which was really the debt of the corporation under their covenant with Colonel Vaughan Lee. In either case the contractor can recover. [Bullen and Leake on Pleadings, 3rd ed., p. 42, was also referred to.]

P. O. Lawrence, K.C., in reply, referred to *Jackson* v. *Barry Ry. Co.* (1) as to the position of the engineer who is appointed arbitrator.

Cur. adv. vult.

Jan. 24. PICKFORD L.J. read the following judgment:—The questions in this appeal arise upon an award stated by an arbitrator in the form of a special case. The arbitration arose out of a contract made between Mr. L. P. Nott (called the contractor) and the Lord Mayor, Aldermen and Citizens of the City of Cardiff (called the corporation), whereby the contractor undertook to construct a reservoir for the corporation. The work proceeded until September, 1914, when it was stopped by mutual consent, and the arbitration was concerned with disputes arising out of it so far as it had progressed.

The main question was whether the arbitrator had power to award payment for work consisting of extras in the absence of written orders given by the engineer for such work. The contract, which was dated November 28, 1910, contained the usual provisions as to the execution of the work and the supply of materials by the contractor to the satisfaction of the engineer and also a definition of the works which was as follows: "'Works' include all the works matters materials and things hereby agreed to be done and supplied respectively by the contractor." The only other provisions of the contract to which I think it necessary to refer are those contained in clauses 7 and 22. [The Lord Justice read the clauses.]

The specification contains several clauses which are material to the questions raised in this appeal. It begins with what is called a "Special Notice," clause 3 of which is as follows: [The Lord Justice read it.] Clauses 4 and 5 contain other provisions as to extras which it is not necessary to set out in detail. In the body of

(1) [1893] 1 Ch. 247.

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the specification clauses 4, 5, 13, and 81 contain the most important provisions as to extras. [The Lord Justice read the clauses.] Clause 124 provides that payment shall be made on certificates of the engineer and that "no certificate shall create liability in the corporation to pay for alterations and additions not ordered in writing by the engineer." It also contains the following provision as to payment of extras: [The Lord Justice read the proviso set out above.] I think the dispute referred to in this clause is a dispute as to the amount of the claim for extras, and does not include a dispute as to a written order. Clause 128 contains the submission to arbitration, and is in these terms: [The Lord Justice read the clause.] The latter part of this clause clearly is inconsistent with the former, and has been introduced to give the contractor an opportunity of questioning the engineer's decisions. Clause 22 of the contract, to which I have already referred, was introduced to avoid the consequences of this inconsistency by providing that the latter part should override the former.

During the progress of the work many disputes arose between the contractor and the corporation, and paragraph 7 of the arbitrator's award deals with those with which this appeal is concerned. They are almost all of the same description, that is, disputes occasioned by the engineer requiring work to be done in a particular manner or materials to be provided of a particular kind on the ground that it was necessary in order to comply with the provisions of the contract that they should be so done and provided, whereas the contractor contended that such requirements were not in accordance with the contract and specification. The arbitrator finds that the engineer had notice of the fact that the contractor disputed his decision, but apparently neither party asked for an immediate arbitration. The contractor proceeded with the work as required by the engineer without any written orders, and now claims to be paid for it as extras although no such order has been given.

He puts his claim in three different ways: (1.) That by the arbitration clause the arbitrator has power to award payment although no written order has been given. (2.) That the corporation are precluded from setting up the absence of a written order as a reason for non-payment because of the conduct of the engineer or

of themselves or of both. (3.) That the sum is recoverable, if not as payment for extras, as damages occasioned by breach of contract on the part of the corporation.

The first ground taken by the contractor can be determined without a detailed examination of the findings of the arbitrator. For the purposes of this question it is only necessary to state that the arbitrator has found the decisions of the engineer to be wrong and unreasonable, and the work and materials required by him not such as are included in the terms of the contract and specification. He has therefore considered them as extras and awarded a sum of money as payment for them. Speaking generally, any tribunal before which a claim of this description comes has no power to dispense with the performance of a condition precedent stipulated by the parties. In the case of an action this has been clearly decided in the case of *Russell* v. *Sa da Bandeira* (1), *Sharpe* v. *San Paulo Ry. Co.* (2), and other cases. An arbitrator to whom the disputes are referred for decision seems to me bound to act on the same principles as the Court, and to determine the rights of the parties according to the contract. This seems to me to be the result of the case of *In re Hohenzollern Aktien Gesellschaft and City of London Contract Corporation* (3), which was cited to us in support of an opposite contention. The case came before the Court on an application to set aside the award on the ground that the arbitrator had exceeded his jurisdiction because he had decided on a question not submitted to him. The Court held that he had not exceeded his jurisdiction because the question whether payment was to be made for work done was clearly a dispute arising under the contract, and such disputes were referred to him. But they also said that for that purpose he had to construe the contract (see Lord Esher M.R. and Lopes L.J. (4)), and the only purpose of construing it could be that the arbitrator should apply its terms to the questions before him. It is true that in that case he construed it so as to give him power to award the payment, and his construction could not be questioned in the procedure then before the Court, but there is nothing to show that his construction was approved or would not

(1) 13 C. B. (N.S.) 149.
(2) L. R. 8 Ch. 597.
(3) 2 Hudson's Building Contracts, 4th ed., 100, 107.
(4) Ibid. 108, 109.

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have been reversed if it could have been brought before the Court in a procedure similar to the present. If, therefore, the arbitrator in this case had power to dispense with the performance of the condition precedent of a written order, such power must have been given by some special provision contained in the submission to him. Although this was not admitted by the contractor's counsel, it was not very strongly contested, but they argued that such special provision could be found in this case. The submission is contained in clause 128 of the specification which I have already read, and nothing is added to it by the appointment of the arbitrator, which is merely to "hear and determine all disputes and differences which have arisen within the meaning of the aforesaid specification tender and agreement." Under this submission the claims carried in by the contractor were money claims of payment for work done, and the arbitrator had to decide whether such payment or any part of it ought to be made. It may be said that one dispute involved was whether payment was to be made for extras without a written order, but unless there was something to the contrary in the submission he must decide that question according to the contract and not in disregard of it. During the argument I asked which was the provision conferring the power of dispensing with a condition precedent, and the answer given was that there was no express provision, but that there must be an implication that such a power was given because otherwise the arbitrator could not make an effective award. In support of this argument as to implication reference was made as usual to the words of Lord Esher M.R. in *Hamlyn & Co.* v. *Wood & Co.* (1) and of Bowen L.J. in *The Moorcock.* (2) It seems to me that this doctrine of implied term must be confined to cases where the contract is silent on a term which is necessary in order to carry it out and therefore must have been intended by the parties, and that it cannot be extended to introduce a term which may make that carrying out more convenient and might have been included if the parties had thought about it. I think a term conferring a power to dispense with the performance of a condition precedent cannot be implied in all arbitrations any more than in cases tried in Court, and it remains to be seen whether there is anything in clause 128 which makes such an implication necessary.

(1) [1891] 2 Q. B. 491. (2) 14 P. D. 68.

As I understand the argument it is in substance this: That the latter part of clause 128 gives to the contractor an appeal from the decision of the engineer, and that the arbitrator can give no effective decision as to extras unless he can in arbitrating on them after the work has been done award payment in the absence of written orders. I do not agree with this contention, though I can see that if the parties had chosen to give him this power it might have been very convenient, especially to the contractor. It would have deprived the corporation of the protection for which they had stipulated, whereby if the work were held to be extras and to involve additional expense the engineer might decide not to carry them out. The clause clearly contemplates that some disputes may arise during the work, and provides that by the consent of the parties or by the decision of the arbitrator an immediate arbitration may be held. Disputes as to whether the method of carrying out a particular work or supplying particular materials is in accordance with the contract are essentially of this nature, and if an arbitration took place and the arbitrator held that the engineer's decision was wrong, such a decision would not be inoperative. The arbitrator could not give the written order nor dispense with it, but such a decision would in practice compel the engineer either to abandon his direction to do the work or to to give the written order. His only other course would be to insist on the work being done without an order and in default take the works out of the contractor's hands under clause 92 or 118. In such a case his decision in doing so would be subject to appeal to the arbitrator, and it would be as a matter of business impossible for him to take this course. If the arbitrator could not on an arbitration held before the work was done dispense with the requirements of the specification as to a written order, I cannot see how he acquires the power to do so because the arbitration is deferred till after the work has been done. It does not seem to me that it is necessary, in order to make his award effective, that such a power should be implied. It was, however, objected that to hold arbitrations before the work was done on a number of disputes such as arose in this case would so delay the work as to make such a course impracticable. I think the difficulties and delays were perhaps put unduly high by the contractor's counsel, but I have no doubt that great delay would be occasioned if there were

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constant differences and that great inconvenience would be caused. But, as I have pointed out, the parties contemplated such interim arbitrations, if I may so describe them, and the fact of such inconvenience does not seem to me sufficient ground for implying a term which they have not inserted. I think, therefore, there is no more reason for implying a term which would give the arbitrator power to dispense with the condition precedent in this submission than in any other, and that no such implication can be considered as essential to the carrying out of the contract.

I ought, perhaps, to mention one argument addressed to us, that is, that experience shows that arbitrators under these construction contracts do in fact make awards in which they dispense with conditions precedent. I attach no importance to such an argument unless the circumstances under which such awards were made are before the Court, especially as experience also shows that in agreeing to a submission to arbitration the parties not uncommonly agree to a term that the arbitrator shall make his award irrespective of the question of written order or certificates.

The second contention on the part of the contractor is that the corporation are debarred from setting up the absence of a written order in the circumstances of this case, and reference was made to the words used by Mellish L.J. in *Sharpe* v. *San Paulo Ry. Co.* (1) The words of Mellish L.J. are these : " Wherever, according to the true construction of the contract, the party only agrees to pay what is certified by an engineer, or what is found to be due by an arbitrator, and there is no agreement to pay otherwise—that is to say, in every case where the certificate of the engineer or arbitrator is made a condition precedent to the right to recover, there the Court has no right to dispense with that which the parties have made a condition precedent, unless, of course, there has been some conduct on the part of the engineer or the company which may make it inequitable that the condition precedent should be relied upon." Those words do not afford much guide to a decision, as Mellish L.J. does not define in any way what facts are necessary to the application of the principle mentioned. I think the authorities show that the employer is not debarred from setting up the non-performance of a condition precedent unless he has himself

(1) L. R. 8 Ch. 612.

in some way been a party to preventing its performance. This was clearly decided in *Clarke* v. *Watson* (1), where Willes J. referred to the case of the architect refusing to exercise a judgment as one in which the employer was not so debarred. It may be noticed that *Pawley* v. *Turnbull* (2), which was cited to us as establishing a different proposition, was before the Court in *Clarke* v. *Watson*. (1) *Hickman & Co.* v. *Roberts* (3) is sometimes cited to the contrary, but in my opinion it is in accordance with the previous authorities. The principle was sometimes expressed in the phrase that there must be collusion between the employer and the architect, and the House of Lords in that case, differing from the Court of Appeal, said that the employer's conduct was not properly described as collusion. But the difference was merely of words, for all the learned Lords held that the architect had acted under the influence of the employer. Lord Loreburn spoke of the unworthy communications by the defendants; Lord Alverstone described the employer as not leaving the architect alone; Lord Atkinson spoke of the architect as under the control or influence of the employer; and Lord Shaw says that he accepted instructions from the owner. In the case of *Kellett* v. *New Mills Urban Council* (4) the last finding of the jury may have been taken to show that the defendants had been parties to the unreasonable conduct of the engineer. If so, the case proceeds upon the same principle as those above mentioned. I think, therefore, that improper conduct on the part of the engineer alone would not debar the corporation from setting up the absence of a written order.

To see whether they are so debarred here it is necessary to examine the findings of the arbitrator, some of which leave a good deal to be desired in the matter of clearness. They are contained in paragraphs 5, 6, and 7 of his award, and the first to which I think it necessary to refer is 6 (*d*). The words are: "The engineer in making such requirements"—that is, requirements as to works and materials—"in excess of the work and materials which the contractor had undertaken to execute and supply under the contract,

(1) (1865) 18 C. B. (N.S.) 278, 285.
(2) 3 Giff. 70.
(3) [1913] A. C. 229, 233, 236, 238, 239; 2 Hudson's Building Contracts, 4th ed., 426.
(4) 2 Hudson's Building Contracts, 4th ed., 298.

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in refusing to allow the contractor to use materials which were in accordance with the contract, and in permitting the resident engineer and inspectors to make and insist upon the compliance with the unusual, unnecessary, excessive, and unreasonable demands in paragraph 6 (*b*) mentioned, and to refuse to allow the contractor to use materials which were in accordance with the contract, and in deciding against the contractor in respect of such matters as he did decide, did not (without any dishonest motive) act fairly or impartially." It has been pointed out by Bowen L.J. in *Jackson* v. *Barry Ry. Co.* (1) that the same absence of bias cannot be expected from an engineer who has to decide whether his own orders are right as from an independent arbitrator, but I think the finding must be taken to be that the engineer in this case showed more bias than was proper even in a person in his position. The finding, however, negatives any dishonest motive, and therefore fraud is removed from consideration. This is sufficient if it were necessary to distinguish this case from *Pawley* v. *Turnbull.* (2) With two exceptions, that is, 5 (*a*) and 7 (*a*), to which I shall refer again, the particular instances given by the arbitrator do not seem to amount to more than that the engineer took a view of the contract with which the arbitrator entirely disagreed and which he thought unreasonable, but in arriving at the general conclusion which I have read he had no doubt evidence before him which we have not. The finding in 5 (*a*) is as follows: [The Lord Justice read the clause.] It is very difficult to follow exactly what this means and what was the engineer's object. He could and did put an end to the claim for extras, so far as lay in his power, by refusing a written order, and no strength was added to his refusal by inducing the contractor to delay sending in his claim. If the object of sending in the claim were to obtain an ex gratia payment the finding would be intelligible. It, is, however, enough to say that it is not suggested that the engineer acted on the instigation of the corporation or with their knowledge. The finding in 7 (*a*) is as follows: [The Lord Justice read the findings (i.), (ii.), (iii.), set out above.] This is the only instance in which the employers are said to have interfered in any way, and, considering both the general and detailed findings of the arbitrator, I think it is evident that he did not intend to find any

(1) [1893] 1 Ch. 238, 247. (2) 3 Giff. 70.

other case of interference. It arises under very peculiar circumstances, not very clearly set out, but the fair result seems to be that the contractor had made a contract with the company mentioned for stone dressed as the engineer required, and had thus accepted the engineer's decision; but a receiver of the company was unfortunately appointed, and he refused to go on with the contract except at an increased price. If this be correct, the contractor could have no claim to any extra payment except as a matter of grace. If the engineer was ready to give this but was prevented from doing so by the corporation, such action on their part did not constitute any interference with him in his duties as arbitrator between them and the contractor. The finding may only mean that the corporation put their case before the engineer as against the contractor, but I doubt if this was the arbitrator's meaning. In any case I can find nothing in this award to establish conduct on the part of the corporation such as to bring them within the principle of the cases I have mentioned, and it must be remembered that the arbitrator was an engineer of great experience who knew quite well what was necessary to establish such a point. I think, therefore, the contractor's second contention also fails.

The third and last contention on this part of the case is that this sum of money is recoverable, if not as extras, as damages for breach of contract. I do not think this contention is sound. I think the acts of the engineer which caused the extra expense to the contractor were his acts as arbitrator and not as agent, and even if in claim 17 the complaint is of the acts of the resident or assistant engineer, such acts were done under the powers of clause 81 of the specification, and did not constitute breaches of contract by the corporation. I think, however, that in that case also the real complaint is against the engineer. As I am of opinion that the claim fails altogether, it is not necessary for me to consider the special points raised by the corporation in respect of claims 11 and 17. I may say, however, that I agree with the judgment of Bray J. on those points.

There remains for decision another question quite distinct from those relating to payment for extra work, that is, whether the corporation are liable to repay to the contractor a sum which he has paid for rates as occupier of a railway which was used for the

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construction of the reservoir. The railway had been made by the corporation some time before for the purpose of constructing another reservoir, but had become practically derelict. Clause 82 of the specification provides as follows: [The Lord Justice read it.] Schedule B deals with the question of wayleaves and covenants. [The Lord Justice read it.] The only wayleave which it is necessary to mention is No. 4, "Col. Vaughan Lee 115*l*. Landlord compensates tenants." After the contract an agreement was made with Colonel Vaughan Lee by which the corporation agreed to pay all rates in respect of the railway. This agreement seems to me to have no bearing upon the question before us. It determined that as between the corporation and Colonel Vaughan Lee the former must bear the burden of the rates, but in the case of the corporation handing over the occupation to some other person it cannot operate to relieve that person as between himself and the corporation from that burden. Nor do I think that, as was contended by the corporation, it imposed that burden on the contractor by reason of the agreement contained in Schedule B to keep all covenants connected therewith. This covenant was not in existence at the time of the contract, and I do not think the agreement mentioned can extend to any future covenants as to the railway which the corporation might choose to make. Nor do I think that these rates are included in the words "charges" and "further charges" in clause 82 of the specification. The arbitrator has found in clause 4 (*l*) of his award, so far as it is a question of fact for him, that the corporation, and not the contractor, were in occupation of the railway, and that in those circumstances, as the contractor, in order to avoid interference with the works, was obliged to pay the rates, there is an implied obligation on the corporation to repay him, and Bray J. has upheld this finding. I regret that I cannot take the same view. I am by no means sure that there was any dispute about the facts, and that the question of occupation does not depend upon the terms of the contract, or that those terms gave such control to the corporation as to bring the case within the decision in *Rochdale Canal Co.* v. *Brewster* (1), but I do not think it is necessary to decide the question. The facts as found were these. The rating authorities communicated with the corporation as to the rates, and they referred them

(1) [1894] 2 Q. B. 852.

to the contractor. There is no reason to suppose that this was not done in the bona fide belief that the contractor was the occupier and the person liable to be rated. The rating authorities, I assume after proper consideration, placed the contractor on the rate-book as occupier, and he informed the corporation, who refused to pay the rates. The contractor, if he were not the occupier, could dispute his liability either by appeal or by opposing the issue of a warrant of distress: see *Whenman* v. *Clark*. (1) According to the arbitrator's finding in clause 4 (*i*) he did in 1911 give notice to the corporation that he was about to appeal, but the award is silent as to the exact steps that he took. He may not have appealed at all; he may not have appealed on that ground, but only on the question of amount; he may have withdrawn his appeal, or it may have been dismissed. Whatever he did or did not do, the appeal did not succeed, and he remained on the rate-book and continued to pay the rates until the stoppage of the work, giving notice to the corporation that he disputed his liability. I can find no term in the contract which binds the corporation to repay the amount to him, but it is contended that such a term must be implied. In the first place this implication is said to arise from the terms of the contract itself because there is no agreement by the contractor to pay the rates and no mention of them in the bills of quantities, whereas there are agreements by him to pay certain charges, e.g., fees to local authorities in clause 7 of the contract, and wayleaves and charges in clause 82 of the specification. It is also contended that the implication must arise from the fact that the corporation were really the occupiers, and therefore there must be an implication that they would repay what was really their debt. I do not think either of these contentions is sound. As to the first, there is nothing in the terms expressed to suggest that in order to carry out the contract it must be implied that the corporation will bear all other expenses, e.g., I cannot see how it can be implied that they agreed to pay the rates on the huts to be constructed under clause 97 of the specification. A much more probable explanation is that this question of rates was not present to the mind of either party. With regard to the second contention, this liability for rates was never the liability of the corporation at all, as in such cases as *Exall*

(1) [1916] 1 K. B. 94.

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v. *Partridge.* (1) The person liable for rates is the person placed upon the rate-book by the rating authority, and so long as the contractor remained on the rate-book he had to pay the rates. He had his remedy as already pointed out, and if he neglected to pursue that remedy, or if it were decided that he was wrong in pursuing it, he cannot, as it seems to me, claim to be repaid. The corporation were throughout, as I read the award, refusing to repay him, and such refusal must have been on the ground that he who had been placed on the rate-book by the responsible authority was the occupier and liable, and not the corporation. I cannot see, even if they were wrong, how these facts raise an implied agreement or obligation to repay him. I think, therefore, the contractor's claim fails on this point also.

The result is that in my opinion the question in the award should be answered that the arbitrator ought not to have awarded any sum to be paid by the employers on any of the said claims, and that the contractor should pay the costs here and below.

BANKES L.J. read the following judgment:—This is an appeal by the corporation of Cardiff from a decision of Bray J. upon a special case stated by an arbitrator. The disputes between the parties arose out of a contract for the construction of a reservoir by the respondent for the corporation. The works were of an extensive character, the contract price exceeding 200,000*l.*, and the time allowed for completion being six years. The contract is dated November 28, 1910. By mutual arrangement the work was suspended in September, 1914, before completion, and in the following month the contractor gave notice that he required the corporation to proceed to arbitration upon certain disputes which had arisen between himself and the engineer during the progress of the works. A full list of the contractor's claims was sent by him to the engineer on November 28, 1914. By an indenture dated June 17, 1915, the corporation and the contractor joined in appointing an arbitrator to hear and determine all disputes and differences which had arisen within the meaning of the specification, tender, and agreement. At a later stage it was arranged between the parties that the claims of the contractor should be made up to September 30, 1914, and this

(1) (1799) 8 T. R. 308.

was done. At the date of the submission to arbitration there was no dispute between the parties as to whether written orders had or had not been given by the engineer for the work for which the contractor was claiming payment. It was an admitted fact that no such orders had been given. The real dispute between the parties was whether the contractor was entitled to payment in spite of the fact that no written orders for the work had been given. This was in substance the main dispute which was referred to the arbitrator. The nature of the disputes and the time when they arose are dealt with in paragraph 2 of the special case, where the arbitrator finds as follows: [The Lord Justice read the paragraph.] The claim referred to by the arbitrator as No. 1 has reference to the liability as between the corporation and the contractor to pay the rates in respect of the line of railway running up to the works. This claim depends upon considerations which are applicable to this claim alone, and has been throughout dealt with separately. The other claims, including Nos. 2 to 17, which have been allowed by the arbitrator, depend upon considerations which are common to all of them. With regard to claims 2 to 17, there are additional considerations which apply to these claims alone.

The facts as found by the arbitrator in respect to claim 1 are contained in paragraph 4 of the special case. The many difficulties of this case are considerably increased by the vague and uncertain language in which the special case is expressed. An instance occurs in paragraph 4 (*i*), where the contractor's intention to appeal against the assessment is mentioned, but nothing is said as to whether the appeal was made, or what the result was. The conclusion I draw from the statement of facts is that the contractor never did attempt as between himself and the rating authority to raise the question of his liability to pay the rate either by appeal or by refusal to pay, and that if he contested anything it was the amount of the rate only; but that as between himself and the corporation he gave them notice that he disputed, and should continue to dispute, his liability to pay the rate. The arbitrator's finding as submitted to the Court is contained in paragraph 4 (*l*) of the special case, which is in these terms: [The Lord Justice read it.]

Bray J. upheld the decision of the arbitrator, holding that he could not interfere with the finding of fact as to the occupation of

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the railway, and under the circumstances he says: "It was clearly the duty of the corporation to do all that was necessary to enable the contractor to have the full use of the railway free from any interruption such as would be caused by their default in paying the rates."

The railway in question was constructed on land the property of various landowners. By clause 82 of the specification the contractor was required to pay all wayleaves in connection with the railway and sidings during the continuance of the contract. The existing wayleaves were set out in schedule B of the specification, and the clause continued: "If any further wayleaves or charges are made the contractor will be called upon to defray the same." In schedule B it was stated that the corporation had entered into "the several agreements for the payment of wayleaves . . . .; and from the date upon which the contract is signed . . . . the contractor will be held liable therefor and must keep all covenants connected therewith." A list of landowners is set out, which includes "Col. Vaughan Lee 115*l.*" The agreement between Colonel Vaughan Lee and the corporation was no doubt in negotiation at the date of the contract, and the amount of the wayleave must have been agreed; but the agreement itself was not signed until some months after the date of the construction contract. Under these circumstances the appellants are not entitled, in my opinion, to claim that the obligation to "keep all covenants" contained in schedule B to the specification extended to a covenant entered into by the corporation in the subsequently executed agreement with Colonel Lee that as between him and them the corporation would pay the rates on the railway. The other point taken by the appellants in support of the contention that there was an express agreement to pay these rates was founded on the expressions "charges and further charges in connection therewith" and "further wayleaves or charges" contained in clause 82 of the specification. It was said that these rates are "charges" within the meaning of this clause. I do not agree. In the first place, used in this connection, I do not think that "charges" is an apt word to use in reference to rates; and, secondly, I think that the words are used in the first instance in reference only to the connection to be made with the Merthyr and Brecon line, and in the second instance in reference to schedule B

and any further wayleaves or charges of a similar character made by landowners in respect of the user of the railway. For these reasons I think that the appellants' contention that the contractor expressly bound himself to pay these rates fails. It becomes, therefore, necessary to consider the other contentions on this point. We were referred to the cases of *Rochdale Canal Co.* v. *Brewster* (1) and *Holywell Union* v. *Halkyn District Mines Drainage Co.* (2), and the learned counsel on both sides minutely criticized the provisions of the construction contract in so far as they bear upon the question of the control retained by the corporation over the railway under that contract. On the one side it was said that the contractor "took over" the railway in the fullest sense of the word so as to constitute him the rateable occupier of it. On the other side it was said that the corporation retained complete control of the railway, and, further, that upon the authorities rateability was a question of fact which the arbitrator had decided in the contractor's favour. To this it was answered that there was no dispute as to the facts; the question was therefore a pure question of law, and must be decided on the construction of the contract. The view I take on these points is this: I think the question in this particular case is a mixed question of fact and law, and so far as it is a question of fact is one peculiarly for a professional man accustomed to deal with this class of contract and this class of work. Having regard to the stringent provisions of the contract in reference to the "works," which in my opinion include the railway, it was quite open to the arbitrator to take the view as a practical man acquainted with the working of these kinds of contract, and in particular with the way this contract was in fact worked, that, to use Lord Davey's language in *Holywell Union Case* (3), the contractor had only a "subordinate occupation" of the railway, and as such was not properly rateable. If I had to decide this question I should have felt considerable difficulty in the matter. I am not suggesting that the arbitrator took a wrong view, but merely that, having taken a view that he was entitled to take, I express no opinion of my own upon it. Thus far I am agreed with the view taken by Bray J. on this point. I am unable, however, to agree with the second

(1) [1894] 2 Q. B. 852. (2) [1895] A. C. 117.
(3) Ibid. 134.

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branch of his judgment on this point, the language of which I have already quoted. Bray J. appears to have been of opinion that, if the contractor was not properly rated, the corporation had not disputed their liability to repay him what he had paid. I do not agree with this view of the contentions of the corporation as laid before the arbitrator, and the liability was strenuously contested in this Court. Both parties are agreed that the construction contract contains no special reference to the payment of rates. The contractor contends that a stipulation must be implied that the corporation shall pay the particular rates which are in dispute. I adopt the language of Lord Esher in *Hamlyn & Co.* v. *Wood & Co.* (1) as the test of whether any such stipulation can be implied. He says: "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned." It is quite true that the construction contract is exhaustively drawn, if I may use that expression, and that it specifies a number of payments that the contractor has to make; but I see no ground for the implication that the contractor was to make no payments in relation to the contract other than the specified ones. For instance, the contractor is under an obligation to construct huts for his workmen, which presumably would be rated. The contract is silent as to who is to pay these rates, but presumably the contractor would be the person rateable. The inference I draw from the construction contract, reading it as a whole, is that either the question of the liability for rates escaped attention in the mass of detail which was being dealt with, or more likely that no mention was made of the rates because it was the intention of both parties that they should lie where they fell. So long as the contractor remains on the rate-book, whether rightly or wrongly, so long, in my opinion, will he continue liable to pay the rates, and without any right to call upon the corporation to repay him. The debt

(1) [1891] 2 Q. B. 491.

is his debt, and the principle of such cases as *Exall* v. *Partridge* (1) does not apply. For these reasons I think that the appeal succeeds in respect of this head of claim, and the award must be amended by striking out the item of 427*l.* 5*s.* allowed by the arbitrator in respect of claim No. 1.

I pass now to consider the main question which really turns upon what is the proper construction of the arbitration clause in the construction contract. It is clause 128 of the specification. This question covers the whole of the remaining items of the contractor's claim. The rival contentions on the question were as follows. The corporation contended that all the items were "extras" within the meaning of the construction contract, that the contract provided in the most careful and explicit terms that certain conditions precedent, including a written order from the engineer, must be complied with before any claim for an "extra" could be established, that no such orders had been given, that the arbitrator had no power to dispense with any of the conditions precedent, and that, the claim to proceed to arbitration having been made after the works had been executed, all the arbitrator could do would be to express an opinion as to whether written orders ought to have been given or not. On the other hand, the contractor contended that on the true construction of the contract the arbitrator had jurisdiction to make an award in the form in which he had made it, namely, in the form of an award giving to the contractor the money value of the extras which had been executed, and in respect of which in his opinion a written order ought to have been given. Alternatively the contractor contended that under the circumstances found by the arbitrator the corporation could not be heard to set up the want of written orders in respect of the items allowed by the arbitrator; and as a further alternative he contended that many of these items represented matters which were not "extras" at all, but were claims for damages for breaches of contract. This point of construction is a difficult one. It is, I think, obvious that the arbitration clause contained in the second branch of clause 128 has been pitchforked into a contract which was drafted upon the assumption that no such arbitration was intended or could ever take place. To get over the preliminary difficulty created by the

(1) 8 T. R. 308.

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contradictory terms of the two parts of clause 128 of the specification a special provision was inserted in the contract (clause 22), which provided that the second portion of the arbitration clause "is intended and shall, except as thereby excepted, be held to override the arbitration provision given to the engineer by the first paragraph thereof." This provision disposes of the absurdity of the clause as it stands, but it leaves untouched what (to use Lord Esher's language which I have already quoted) the parties "must have intended" by the arbitration clause which they inserted. To arrive at a conclusion on that point one must, again borrowing Lord Esher's language, consider the terms of the contract in "a reasonable and business manner." The arguments presented to this Court on this question of construction may be summarized thus. For the corporation it was said: The whole scheme of this construction contract in reference to extras is to provide that the corporation shall not be rendered liable for any extras unless and until all the conditions precedent laid down in the contract are fulfilled. That if any question arises between the contractor and the engineer as to whether anything is or is not an extra the contractor, if he disputes the engineer's view, must proceed to arbitration before the work is done, in order to give the corporation the opportunity of deciding whether to have the work done or not, should the arbitrator decide in favour of the contractor's contention. And that at whatever stage the dispute comes before the arbitrator he is bound to decide the dispute in accordance with the terms of the contract, and cannot dispense with the performance of any conditions precedent. For the contractor it was said: With regard to a contract of this kind, the view contended for by the corporation is impossible and absurd. This is a contract for the construction of a reservoir. No question has arisen as to additional works in the sense of increasing its size or otherwise as to which time for deliberation is possible. The questions which have arisen are questions relating to the way in which the contract works are to be performed, and whether certain things are or are not necessary in order to comply with the requirements of the contract. From a business point of view it is quite impossible to stop the work while such questions as these are arbitrated on. It was the engineer whom the corporation appointed who required these things to be done

and gave orders that they should be done. Notice was given to the engineer in accordance with the contract that his view was disputed, and this notice, unless and until it was withdrawn, carried with it a claim for arbitration. If the engineer or the corporation desired an authoritative decision before the work was carried out they should have claimed immediate arbitration. The contractor was under no obligation under the contract to go to arbitration at any particular time, and the intention of both parties must be taken to have been that at whatever stage in the work a dispute was brought before the arbitrator he should have jurisdiction to make an effective award. Looking at the matter broadly and as a whole, and without laying stress upon any particular language used in different parts of the construction contract, I have come to the conclusion that the contractor's contention is the right one and should prevail. If the language of the construction contract is referred to, I think that it supports this general view. In the first place, the language of the arbitration clause is quite general. It refers to "any dispute" without limit of time or circumstances. It requires the notice of a dispute to be given "forthwith," but it makes no similar provision with regard to the holding of the arbitration. It contains no provisions such as one would expect to find when an immediate decision which should not delay the work in its natural order of progress is contemplated. On the contrary, the procedure laid down rather indicates that an appeal for a speedy decision will be the exception rather than the rule. The seven days allowed for a reply even when immediate decision is required is not suggestive of the kind of inquiry which the corporation's construction of the clause renders necessary. The whole language of the clause is in marked contrast to that used in clause 81, where in the contract as originally drawn the engineer was empowered to act promptly and at once. I think also that the provisions with regard to payment in clause 124 of the specification point to an intention that disputed or unadjusted claims for extras are to stand over until the final settlement, when they may, if necessary, be disposed of by an award of an arbitrator. I think that the contention of the contractor can be supported on another ground also. The contention on the part of the corporation in effect introduces into the contract a further condition precedent in their favour,

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namely, that if the contractor claims arbitration on any question relating to work for which the contract requires an order in writing the arbitration must be proceeded with before the work is executed, in order to give the corporation an opportunity of saying whether if the arbitrator decides in the contractor's favour they will have the work done or not. This condition precedent the corporation can ensure the performance of themselves if they so desire. It is always in their power to claim to proceed to arbitration before the work is done if the contractor does not do so himself. What is the position if neither party claims to proceed to arbitration but the work proceeds on the verbal instructions of the engineer? For the purpose of receiving notice of a claim for arbitration the engineer is the agent of the corporation. The corporation must therefore be taken to be aware of the exact position, and to be consenting parties to the work being proceeded with after a claim by the contractor for arbitration on the question of whether the work so being proceeded with is an extra or not. The dispute between the parties which arises under these circumstances appears to me to be a dispute not merely as to whether the engineer was right or wrong in refusing to treat the work as an extra and to give a written order for it, but the dispute includes the question of what the contractor is entitled to be paid for the work so done, assuming that the engineer ought to have given a written order for it. If this view is correct, the disputes in the present case were clearly within the arbitration clause and the arbitrator had jurisdiction to deal with them as he did. I regret that on this part of the case I am unable to come to the same conclusion as the other members of the Court, but, having formed the opinion which I have expressed, it is not necessary that I should consider at any length the other points relied on by Mr. Upjohn. These points depend largely upon certain findings of the arbitrator, and I confess that had my decision turned upon them I should have liked to have some explanation from the arbitrator as to what those findings mean.

As regards the claim for damages for breach of contract, I think that, with the possible exception of claim 13, the arbitrator has found that the acts and defaults of the engineer were acts and defaults of the engineer acting in his quasi-judicial capacity, and not merely as the agent of the corporation. For such acts and

defaults no action for damages against the corporation will, in my opinion, lie. With regard to claim 13, the acts complained of are those of the resident engineer and inspectors in requiring the stone toe of the embankment to be washed and wire-brushed. It would appear from paragraph (iii.) of the detailed finding of the arbitrator on this head of claim that he really considered that the responsibility for these requirements rested with the engineer. If so, no distinction can be drawn between this claim and the others. Even if this be not the case, in my opinion the acts of the resident engineer and inspectors do not amount to any breaches of the construction contract. The corporation gave no warranty against any excess of zeal on the part of their employees. The contractor was not bound to obey their orders, as he was given an appeal from them to the engineer, and from the engineer to the arbitrator. If the contractor chose to obey their orders without any such appeal, he has only himself to blame for any loss he may have sustained.

With regard to Mr. Upjohn's point that the corporation could not be heard to set up the want of written orders, I doubt very much whether the cases to which he referred us, and of which *Pawley* v. *Turnbull* (1), *Sharpe* v. *San Paulo Ry. Co.* (2), and *Kellett* v. *New Mills Urban Council* (3), are illustrations, have any application in a case where an effective appeal from the engineer whose conduct is complained of to an arbitrator is given. It is not necessary to decide the point, but had the decision of this appeal turned upon this point, I should have felt inclined to send the special case back to the arbitrator for an explanation of his exact meaning upon some of the points included in paragraphs 5 and 6 of the special case, and particularly paragraph 5 (*a*). [The Lord Justice then dealt with two other points which it is not material to set out.] In the result, the appeal, in my opinion, fails except as to claim No. 1.

NEVILLE J. read the following judgment :—Having regard to the arguments which have been addressed to the Court, I will refer to two principles of law which I think are well recognized and of great importance. So long as the terms of a contract are not illegal nor contrary to public policy, the parties to it may make such bargain

(1) 3 Giff. 70.
(2) L. R. 8 Ch. 597.
(3) 2 Hudson's Building Contracts, 4th ed., 298.

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as they please without interference from the Courts. The Courts have nothing whatever to do with questions of harshness or oppressiveness unless certain forms of equitable relief are sought. In cases where the parties are silent upon an essential term of the contract the Court may imply an agreement between them to the necessary effect; not, however, where it may have been, but only when the Court is satisfied that it must have been, intended by the parties. The eloquent passage in Bowen L.J.'s judgment in the case of *The Moorcock* (1), cited to us, means, I think, no more than this.

Dealing in the first instance with the question of whether the arbitrator had power to award payment for extras in the absence of any order in writing, it is not contested that an order in writing is a condition imposed by the contract precedent to the liability of the corporation for extras. But it is said that the effect of the arbitration clause is to enable the arbitrator to dispense with a written order upon a reference to him. I can find no such power conferred by the clause upon the arbitrator. The arbitrator has no power to settle disputes which do not arise under the contract either by the terms of the clause or under the reference. The corporation have expressly excluded liability for extras in the absence of the fulfilment of the condition, and I know of no power in the Court or the arbitrator to deprive them of the protection for which they have expressly stipulated in the contract. To hold otherwise seems to me to involve an alteration of clause 3 of the "Special Notice" and clause 5 of the contract by adding by implication the words "or shall be held to be extras by the arbitrator," and I can find no such ground for such an implication. It is said that such a term may be implied because otherwise the work could not proceed with due expedition, inasmuch as the method adopted by the parties for settling matters in difference has been proved by experience to be dilatory, and that therefore they must have intended their disputes to be decided ex post facto, and not as a preliminary to doing the work or giving the order in writing. The answer to this appears to me to be that even were it likely that their expectations would be disappointed the parties have expressly provided a means of getting what the contract describes as an immediate determination of matters in difference should the arbi-

(1) 14 P. D. 68.

trator think the case suitable. However much practical experience may have disappointed expectation, the expectation is expressed in the contract, and no clause can be implied on the assumption that the parties must have known that it was likely to be disappointed. It is urged that the matters in question were extras, that the engineer ought to have given an order in writing, and that therefore he must be deemed to have given it. If the engineer gives an order for extras he has his employers to reckon with. Non constat that if he knew what he ordered was an extra he would order it at all. You cannot, therefore, here apply the equitable principle of treating that as done which ought to have been done. The engineer did not order extra work, but what he denied to be extra work. Even if it were shown that the engineer ordered what he admitted was extra work but refused to give an order in writing, the principle still would not apply, because in so doing, that is, in ordering extras without giving a written order, he was exceeding his authority to the knowledge of the contractor, and consequently could not thereby impose liability upon his principals, the corporation.

In my view the findings of the arbitrator do not afford sufficient ground for the contention that the corporation are estopped from setting up the absence of written orders as a defence to the claim for extras. I do not know of any distinction between the doctrine of estoppel as applied in law and in equity. Estoppel arises where the conduct of a party to litigation has rendered it inequitable that he should insist upon his legal rights, but I think inequitable in this connection means unjust, and does not refer to any particular system of jurisprudence. In the present case the findings of the arbitrator with regard to the engineer seem to me to refer to his acts as arbitrator, and not as the agent of the corporation. The finding with regard to the substitution of one kind of stone for another I do not find very easy to follow, but I think the allowance there referred to was given by the engineer as a matter of grace and not as of right, in which case the corporation would be entitled to discontinue the payment. This is the only finding which in any way associates the corporation with the acts of the engineer. It appears to me that in dealing with the conduct of the engineer the arbitrator expressly excludes any charge of fraud. I think that in

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contracts of this nature the architect or engineer acts in a double capacity. He is not solely the servant of the employer, nor solely arbitrator between the employer and the contractor. He must be taken to act in one or other of these capacities, according to the nature of the acts done. In my opinion, an order given or a demand made by the engineer in the first instance, which is ultimately held to be outside the terms of the contract, might involve the corporation in damages, although the engineer had himself upheld as arbitrator the order or demand. What I think prevents any such liability arising in the present case is that the contractor's claim is in respect of extras, and by the terms of the agreement an order in writing is required to bind the corporation and such order is not forthcoming.

With regard to the liability of the employer in contracts of this nature for the acts of an engineer or architect, it appears to me that in the absence of fraud the employer cannot be estopped from asserting his rights by the conduct of the engineer or architect when acting as arbitrator and not as agent. The judgment in *Pawley* v. *Turnbull* (1) may at first sight appear to be contrary to this view, but I think it may be explained on the ground that the facts warranted a finding that the employer had himself procured the acts of the architect complained of. Where the parties have agreed to appoint a judge in matters between them, I cannot see how his conduct, however mistaken, so long as it is honest, can create an estoppel against either party.

With regard to the question whether the rates paid by the contractor in respect of the railway are repayable by the corporation, it seems to me there are no facts in dispute as to the nature of the occupation. The question is purely whether upon the true construction of the contract (*a*) the contractor is in occupation of the railway within the meaning of the statute, and (*b*) if not, whether there is any obligation upon the corporation to repay to the contractor the rates paid by him. With regard to (*a*), it seems to me that the words "take over" in connection with the context prima facie involve occupation, and I find no such control retained in the corporation as to bring the case within the cases cited. Further, I think that whether or not the contractor was properly put upon

(1) 3 Giff. 70.

the rate-book is not a question between the contractor and the corporation. With regard to (*b*), I find no reference in the contract, direct or indirect, to the matter, and I see no ground for implying a contract on the part of the corporation to repay to the contractor the rates which as the result of the contract he may be called upon to pay. I think, therefore, the arbitrator was wrong in regard to this matter as well as with regard to the extras, and that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Smith, Rundell & Dods, for J. L. Wheatley, Cardiff.*

Solicitors for respondent: *Kendall, Price & Francis.*

W. F. B.

BIRMINGHAM UNION, APPELLANTS *v.* TIMMINS, RESPONDENT.

1918
April 19.

Poor Law—Married Woman—Requirement of Relief—Maintenance Order—Cessation of Payments by Husband—Whether Order a Bar to Complaint by Guardians—Poor Law Amendment Act, 1868 (31 & 32 *Vict. c.* 122), *s.* 33.

By s. 33 of the Poor Law Amendment Act, 1868, "When a married woman requires relief without her husband, the guardians of the union . . . . to which she becomes chargeable, may apply to the justices . . . . and thereupon such justices may summon such husband . . . . to show cause why an order should not be made upon him to maintain his wife; and . . . . make an order upon him to pay such sum, weekly or otherwise, towards the cost of the relief of the wife, as, after consideration of all the circumstances of the case, shall appear to them to be proper . . . .":—

Held, that where a wife has obtained a maintenance order against her husband under the Summary Jurisdiction (Married Women) Act, 1895, and he has ceased to make any payments under the order and his wife has subsequently become chargeable to the union, the mere fact of the existence of a maintenance order which the husband is no longer obeying does not disentitle the guardians to obtain an order against him under the above section.

CASE stated by justices.

By an order made by a Court of summary jurisdiction on August 3, 1916, under the Summary Jurisdiction (Married Women)

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Act, 1895, it was adjudged that the respondent had deserted his wife, and it was ordered that she should no longer be bound to cohabit with him, that she should have the custody of one of the two children whilst under the age of sixteen years, and that the respondent should pay her personally 6*s.* weekly for maintenance. The respondent complied with the order until about October 2, 1917. About that date his wife became ill, and sent back to him the child of which she had the custody, and he then ceased making payments under the order. The respondent's wife became an inmate of the appellants' workhouse on October 23, 1917, and on January 4, 1918, a complaint was preferred by the appellants against the respondent, under s. 33 of the Poor Law Amendment Act, 1868 (1), that on October 23, 1917, his wife required relief from the appellants without the respondent, and thereby became, and still was, chargeable to the common fund of the appellants. On this complaint the respondent was summoned to show cause why an order should not be made upon him to maintain his wife. At the hearing on January 18, 1918, it was proved that the respondent's wife was still an inmate of the appellants' workhouse, that the order of August 3, 1916, had not been varied or discharged, and was still in force, and

(1) The Poor Law Amendment Act, 1868, s. 33: "When a married woman requires relief without her husband, the guardians of the union or parish, or the overseers of the parish, as the case may be, to which she becomes chargeable, may apply to the justices having jurisdiction in such union or parish in petty sessions assembled, and thereupon such justices may summon such husband to appear before them to show cause why an order should not be made upon him to maintain his wife; and upon his appearance, or, in the event of his not appearing, upon proof of due service of such summons upon him, such justices may, after hearing such wife upon oath, or receiving such other evidence as they may deem sufficient, make an order upon him to pay such sum, weekly or otherwise, towards the cost of the relief of the wife, as, after consideration of all the circumstances of the case, shall appear to them to be proper, and shall determine in such order how and to whom the payments shall from time to time be made; which order shall, if the payments required by it to be made be in arrear, be enforced in the manner prescribed by the Act of the eleventh and twelfth Victoria, chapter forty-three, for the enforcing of orders of justices requiring the payment of a sum of money: provided that such order may be at any future time revoked by the justices in petty sessions assembled, if they see sufficient cause for so doing."

that the respondent had on many occasions asked his wife to return to him. It was contended for the appellants that the justices had no right to consider evidence as to the relationship of the parties prior to the order of August 3, 1916; but they decided to hear such evidence, and upon it they decided that the respondent was willing to maintain his wife; that, in any event, as she had a maintenance order which could be enforced against him, he was not legally responsible for her maintenance by the appellants, and that on the evidence they could not hold the respondent's wife to be justified in living apart from him. The justices therefore dismissed the complaint.

H. H. Joy, for the appellants. The decision of the justices is based on three grounds—(1.) that the respondent was willing to maintain his wife, (2.) that as she had a maintenance order against him he was not responsible for her maintenance by the guardians, and (3.) that the wife was not justified in living apart from him. None of these grounds can be supported. The respondent was refusing to make any payments under the maintenance order, and therefore the justices could not properly hold that he was willing to maintain her. The existence of the maintenance order, which the respondent was not obeying, was no answer to the complaint by the guardians. In *Oxford Guardians* v. *Barton* (1) it was held that a protection order obtained by a wife under s. 21 of the Matrimonial Causes Act, 1857, did not absolve the husband from liability to have an order made upon him to maintain his wife at the instance of the guardians under s. 5 of the Poor Law Amendment Act, 1850. It was, moreover, inconsistent on the part of the justices, in the second ground for their decision, to rely on the existence of the maintenance order, for their third ground shows that in their opinion the maintenance order was wrong. It was not open to the justices to question the correctness of the maintenance order. That matter was res judicata. Further, the justices in their third ground appear to have assumed that the onus was on the wife to show that she was justified in living apart from her husband. On the contrary, in view of the maintenance order, she must be presumed to be justified in living apart, as the order authorized her to do so. If the guardians

(1) (1875) 33 L. T. 375.

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had taken penal proceedings against the respondent for failure to maintain his wife the existence of a maintenance order with which he was not complying would have afforded him no defence: *Shaftesbury Union* v. *Brockway*. (1)

Maddocks, for the respondent. Under s. 33 the husband can show cause why the order should not be made against him, e.g. where the wife has committed adultery: *Culley* v. *Charman*. (2) There is therefore no absolute obligation upon a husband to maintain his destitute wife. It was open to the justices to inquire into the correctness of the maintenance order. It was not res judicata but res inter alios acta. The issues were different. On the complaint by the guardians the justices had to ascertain whether the wife was properly chargeable to the union. She was not so chargeable when she had a maintenance order that she could have enforced. In *Shaftesbury Union* v. *Brockway* (1) it was held that the existence of an order under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, did not affect the husband's obligation to maintain the children, but in that case the charge against the husband was under s. 3 of the Vagrancy Act, 1824, under which there is no offence unless the refusal to maintain is wilful. Here the justices have found that the respondent was willing to maintain his wife. The combined effect of s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, and s. 7 of the Bastardy Laws Amendment Act, 1872, is that the guardians could themselves have enforced the maintenance order. There cannot be two concurrent enforceable orders for the wife's maintenance. The maintenance order would not come to an end automatically even on the resumption of cohabitation: *Matthews* v. *Matthews*. (3) As the magistrates have found that the wife had no good cause for not returning to her husband, they were entitled to dismiss the complaint: *Fordham* v. *Young*. (4)

Joy was not called on to reply.

DARLING J. This case is a difficult one, and I am not prepared to say that I agree with the other members of the Court on all the points involved, but I think that the appeal should succeed on one ground, and therefore I do not differ from their conclusion.

(1) [1913] 1 K. B. 159.
(2) (1881) 7 Q. B. D. 89.
(3) [1912] 3 K. B. 91.
(4) (1888) 53 J. P. 133.

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Darling J.

The magistrates appear to have considered evidence as to the whole of the circumstances of the relations of the respondent with his wife, and even to have gone into the question whether the maintenance order had been rightly made, but in the view which I take of the case it is unnecessary for me to express any opinion as to whether the magistrates were entitled to adopt that course. I leave out of account altogether the finding that the respondent was willing to maintain his wife, but they go on to say that, in any event, as she had a maintenance order which could be enforced against him, he was not legally responsible for her maintenance by the appellants. That appears to me to be a decision that as a matter of law the mere fact that the wife had obtained a maintenance order against the respondent disentitled the appellants from obtaining an order against him to maintain her. That decision amounted to holding that it was wholly immaterial whether the respondent was making payments under the maintenance order or not. In my opinion the justices were wrong in so holding. Even if the respondent had been making the payments required by the maintenance order, I think, though it is not necessary to decide the point, it would have been open to the justices to inquire whether it was possible for the wife to live on the amount of such payments, and, if not, the justices could have made an order at the instance of the appellants. As the justices have gone wrong on a vital point, the appeal should be allowed and the case remitted to them to hear and determine according to law.

AVORY J. In my opinion none of the grounds on which the justices have based their decision can be supported. I am clearly of opinion that the mere fact that the respondent was willing to maintain his wife was no answer to the complaint in such a case as this if the evidence proves that he had failed, and was still failing, to maintain her. From about October 2, 1917, to the hearing of the summons on January 18, 1918, the respondent had contributed nothing to the support of his wife, who was living separate from him under the authority of the maintenance order of August 3, 1916.

The next ground given by the justices for their decision, namely, that as the respondent's wife had a maintenance order which could be enforced against him he was not legally responsible for her

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maintenance by the appellants, is equally bad. As the respondent was not obeying the maintenance order and had not obeyed it since about October 2, 1917, it was no answer to the complaint for the respondent to say that there was already an order against him to maintain his wife.

The justices also say that on the evidence they could not hold the respondent's wife to be justified in living apart from him. In so deciding they have gone wrong as to the burden of proof. On such a complaint as this the burden was not on the wife to show that she was justified in living apart from her husband. If, as in *Culley* v. *Charman* (1), where the wife had committed adultery, the respondent could have shown that his wife had committed a matrimonial offence, and that he had in consequence ceased to cohabit with her, that might have shown that he was not liable to maintain her, but the burden was not on the wife to show that she was justified in living apart from him. She had a justices' order which justified her in living apart, and therefore the prima facie presumption was that she was living apart by the sanction of that justices' order, and it was for the respondent to displace that presumption and not for his wife to establish her right to live apart from him.

In those circumstances it seems to me that this woman was a married woman who within the section required relief without her husband and had become chargeable to the union. The words "requires relief" mean "needs relief." She was in fact in the workhouse and she needed relief, and thereupon it was the duty of the guardians, in order that the expense might not fall on the rate-payers, to take proceedings against her husband. On those proceedings the husband has an opportunity of showing cause why an order should not be made against him. In my opinion the respondent in this case did not show any sufficient cause and the grounds on which the justices dismissed the complaint were wrong. The case should therefore be remitted to the justices for rehearing, and they should make an order against him unless he shows sufficient cause on some ground other than those stated in the case. If the justices make an order against him, it will be open to him to apply for a discharge of the previous order.

(1) 7 Q. B. D. 89.

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SALTER J. I agree with the judgment of Avory J. The cases decided on s. 33 show how it is to be construed. There must be a married woman who requires relief without her husband and she must in fact be chargeable to the union. Where those facts exist the onus is on the husband to show cause why the order should not be made against him. The cases point out some of the grounds on which he can show cause. For instance, he may prove that there has been misconduct on the part of his wife which disentitles her to look to him for maintenance or to cohabit with him, or he may show that he is making her a proper allowance, in which case I apprehend that no order will be made against him, or he may show that he is willing to maintain her in a common home, and this would be a good cause unless his conduct is such that his wife is justified in refusing to return to him.

I agree with Avory J. that none of the grounds given by the justices for their decision can be supported. The only question that has caused me any doubt is whether the dismissal of the complaint could not be justified on the ground that the respondent's wife was not a person who required relief and who was chargeable, i.e. properly chargeable, to the union. If she had been a person to whom money was owing by persons who were willing to pay her, that would have been a good ground for saying that the justices had no jurisdiction to make an order. But the respondent had ceased to make any payments under the maintenance order, and I do not think the existence of a maintenance order which he was not obeying was a fact which made her not properly chargeable to the union. I therefore think the appeal should be allowed and the case remitted to the justices with the direction already indicated by Avory J.

Appeal allowed and case remitted.

Solicitors for appellants: *Sharpe, Pritchard & Co., for R. J. Curtis, Birmingham.*

Solicitors for respondent: *Murr, Rusby & Co., for Sharpe & Darby, West Bromwich.*

J. E. A.

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April 26.

FOX, Appellant *v.* PETT, Respondent.

Local Government—County Council—Custody of Parish Documents—Tithe Apportionment Map—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 17, *sub-s.* 8—*Justices—Jurisdiction—Order for Removal of Parish Documents—Tithe Act*, 1860 (23 & 24 *Vict. c.* 93), *s.* 28.

A county council made an order under s. 17 of the Local Government Act, 1894, that the tithe apportionment map of a parish should be deposited in the parish school. The map was in the possession of the incumbent of the parish, and, the order not having been complied with, an application was made to justices in petty sessions, under s. 28 of the Tithe Act, 1860, for an order that the map should be removed from the custody of the incumbent and deposited in accordance with the directions contained in the order of the county council. On the hearing of the application the incumbent tendered evidence to prove that the order of the county council did not provide for the security and due preservation of the map, nor for the convenience of the persons interested therein. The justices ruled that the order of the county council was final and that the evidence tendered, therefore, could not be received, and they made the order for the removal of the map as asked for:—

Held, that s. 28 of the Act of 1860 has not been impliedly repealed by s. 17, sub-s. 8, of the Act of 1894, and that the justices had jurisdiction to hear and consider the evidence, and, while giving due weight to the directions contained in the order of the county council, to make such order as, having regard to the evidence, they thought proper in the circumstances.

Lewis v. *Poole* [1898] 1 Q. B. 164 considered.

Per Darling J.: The order of the county council was invalid in that it purported to deal with the custody of the map separately from the sealed copy of the instrument of apportionment.

Case stated by justices of the petty sessional division of Great Torrington in the county of Devon.

On October 13, 1917, an information was preferred by the respondent, John Thorne Pett, against the appellant, Thomas Edward Fox, for that the appellant then unlawfully had in his possession the tithe apportionment map of the parish of Shebbear, he, the appellant, not being the person or one of the persons legally entitled to the possession of the map, and that the respondent on October 10, 1917, had duly given to the appellant notice in writing

stating that the respondent would on November 17, 1917, apply to the justices for an order under s. 28 of the Tithe Act, 1860 (1), that the said map of, and belonging to, the parish of Shebbear, made under the Tithe Act, 1836, should be removed from the custody of the appellant and should be deposited as directed by an order made by the county council of Devon on March 15, 1917, under the Local Government Act, 1894, determining the custody thereof.

On the hearing of the information the following facts were proved or admitted :—

The appellant was the incumbent of Shebbear. The respondent was the chairman of the Shebbear Parish Council, and the information was preferred by him in that capacity. When the Local Government Act, 1894, came into operation, the documents relating to the tithes of the parish of Shebbear, namely, the sealed instrument of apportionment and the tithe map in three sections, were in the custody of the late Samuel Pett of Shebbear, but for a number of years the tithe apportionment map had been in the hands of the parish council and had never been in the hands of the appellant. In 1910 the county council of Devon, at the suggestion of the appellant, sent a sub-committee to Shebbear to consider the question as to where the tithe apportionment map should be placed, and as a result the county council suggested that it should be placed in the council schoolroom, Shebbear, and that the parish council should have one key and the schoolmaster another key. The

(1) Tithe Act, 1860 (23 & 24 Vict. c. 93), s. 28: "Whenever any person, other than the persons legally entitled to the possession of the same, shall have possession of the sealed copy of any confirmed instrument of apportionment, it shall be lawful for any two justices of the peace for the county or other jurisdiction within which the lands mentioned in the said apportionment are situate, upon the application of any person interested in the lands or rentcharge, and upon fourteen days' notice in writing of such application to the person or persons in whose custody such copy shall be at the time of such application, to hear and determine such application; and upon hearing such application the said justices may order such copy to be removed from the custody of the person holding the same, and to be deposited in such other custody as the said justices, having reference to the security and due preservation of such copy, and to the convenience of the parties interested therein, may think fit, ..."

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suggestions of the county council were accepted by the parish council and the appellant, and on January 6, 1911, the map was duly placed in a tin box in the council schoolroom and keys were provided for the parish council and the schoolmaster. On September 7, 1916, the appellant entered the schoolroom and forcibly opened the tin box and extracted therefrom two of the sections of the map.

On representation from the Shebbear Parish Council, the county council appointed a committee to make inquiries and to report, and on March 15, 1917, the county council made the following order: "(1.) That the map shall be in the custody of the parish council. (2.) That until the council otherwise order, the map shall be preserved in the Shebbear council school in a suitable tin box, fitted with a lock and key, the key to be kept by the parish council. (3.) That the map shall be available for inspection by the incumbent and churchwardens of the parish on weekdays, except Saturdays, from noon to 2 P.M., and from 4.30 P.M. to 8 P.M., and on Saturdays from 10 A.M. to 4 P.M. (4.) That twenty-four hours' previous notice of any proposed inspection by the incumbent or churchwardens shall be given in writing by him or them to the clerk to the parish council." This order was duly served on the appellant. On October 10, 1917, the appellant was duly served with notice of the respondent's intention to apply to the justices for an order that the map be removed in accordance with the order of the county council.

It was contended for the respondent that by virtue of s. 64 of the Tithe Act, 1836 (1), and s. 17, sub-ss. 8, 9, of the Local Government Act, 1894 (2), and the order of the county council of March 15, 1917,

(1) Tithe Act, 1836 (6 & 7 Will. 4, c. 71), s. 64: "Two copies of every confirmed instrument of apportionment . . . . shall be made and sealed with the seal of the said Commissioners, and one such copy shall be deposited in the registry of the diocese within which the parish is situated, to be there kept among the records of the said registry, and the other copy shall be deposited with the incumbent and church or chapel wardens of the parish for the time being, or such other fit persons as the Commissioners shall approve, to be kept by them and their successors in office with the public books, writings, and papers of the parish; . . . ."

(2) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 17, sub-s. 8: "The custody of the registers of baptisms, marriages,

the appellant was a "person other than the persons legally entitled to the possession" of the map, within the meaning of s. 28 of the Tithe Act, 1860, and that the parish council of Shebbear was legally entitled to the custody of the map, and that the justices had power, under s. 28 of the Tithe Act, 1860, to order, and should order, the removal of the map from the custody of the appellant into the custody of the parish council.

It was contended for the appellant that s. 28 was limited to an application in respect of a sealed copy of a confirmed instrument of apportionment and did not extend to a tithe apportionment map; and that the appellant was entitled to give evidence to show that the order of the county council did not provide for the security and due preservation of the map, nor for the convenience of persons interested therein, and that the justices had power to make such an amended order as they thought to be justified by the evidence to be adduced by the appellant.

The justices held that the two sections of the map were an integral part of the sealed copy of the tithe apportionment map, and that they were not entitled to consider any evidence with regard to the place of deposit or the security or preservation of the map, or with regard to the convenience of persons interested therein, but that

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and burials, and of all other books and documents containing entries wholly or partly relating to the affairs of the Church or to ecclesiastical charities, except documents directed by law to be kept with the public books, writings, and papers of the parish, shall remain as provided by the existing law unaffected by this Act. All other public books, writings, and papers of the parish, and all documents directed by law to be kept therewith, shall either remain in their existing custody, or be deposited in such custody as the parish council may direct. The incumbent and churchwardens on the one part, and the parish council on the other, shall have reasonable access to all such books, documents, writings, and papers, as are referred to in this subsection, and any difference as to custody or access shall be determined by the county council."

Sub-s. 9: "Every county council shall from time to time inquire into the manner in which the public books, writings, papers, and documents under the control of the parish council or parish meeting, are kept with a view to the proper preservation thereof, and shall make such orders as they think necessary for such preservation, and those orders shall be complied with by the parish council or parish meeting."

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the order of the county council was final and conclusive, and they made an order for the removal of the map from the custody of the appellant to the custody of the parish council.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law, and, if not, what should be done in the premises.

Disturnal, K.C., and *E. Percival Clarke*, for the appellant. First, s. 28 of the Tithe Act, 1860, only confers jurisdiction upon the justices to make an order with regard to the custody of a sealed copy of a confirmed instrument of apportionment. Where, as in this case, the map exists separately from the instrument of apportionment the justices have no power under s. 28 to make an order for the custody of the map. Secondly, assuming s. 28 does apply to a map, the duties of the justices are not administrative only. They must consider the question of the security and due preservation of the map and have regard to the convenience of the parties interested. Although the county council had made an order that the map should be kept in the council schoolroom at Shebbear, the appellant desired, and was entitled, to give evidence to show that that was not a suitable place and that his right of inspection as a party interested had not been sufficiently protected. Sect. 17, sub-s. 8, of the Local Government Act, 1894, has not impliedly repealed s. 28 of the Tithe Act, 1860: *Lewis* v. *Poole*. (1)

Douglas Hogg, K.C., and *Jowitt*, for the respondent. The map forms part of the apportionment: see Tithe Act, 1836, ss. 55, 60, 63. It is not contended that s. 17, sub-s. 8, of the Local Government Act, 1894, has ousted the jurisdiction of the justices under s. 28 of the Act of 1860, but where, as in this case, a county council has exercised its jurisdiction under s. 17, sub-s. 8, after hearing the parties interested, and has made an order providing for the custody of a document, the justices cannot review that order. The justices are not a court of appeal from the county council. It is a case of the exercise of concurrent jurisdictions by two different tribunals, and when one has been invoked the other cannot reverse or vary its decision. The powers of the justices under s. 28 were therefore, in the circumstances of the present case, administrative only, and

(1) [1898] 1 Q. B. 164.

they rightly refused to hear the evidence which the appellant tendered.

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Disturnal, K.C., in reply. If the true view is that the map forms part of the instrument of apportionment, it must by s. 63 of the Act of 1836 be attached to the instrument, unless the Commissioners have by an order made under s. 26 of the Act of 1860 directed that the map shall be detached and held separate from the instrument. No order for detaching the map has been made in this case, and, therefore, the order of the council which purported to deal with part only of the instrument of apportionment was invalid.

DARLING J. In this case the appellant appeared before the justices on an information which alleged that he unlawfully had in his possession the tithe apportionment map of the parish of Shebbear. The justices made an order that the appellant should deliver up the map to the parish council, and stated this case for the opinion of this Court, one of the questions being as to whether the jurisdiction of the justices under s. 28 of the Tithe Act, 1860, has been ousted by reason of an order made by the county council of Devonshire under s. 17 of the Local Government Act, 1894. The facts are set out fully in the case. By s. 64 of the Tithe Act, 1836, it is provided that two copies of every confirmed instrument of apportionment shall be made and sealed with the seal of the Commissioners, and that one copy shall be deposited in the registry of the diocese and the other with the incumbent and churchwardens of the parish, and all persons interested are to have access to it; and s. 64 goes on to provide that "every recital or statement in or map or plan annexed to such confirmed apportionment . . . . shall be deemed satisfactory evidence of the matters therein recited or stated, or of the accuracy of such plan." Then, by s. 26 of the Tithe Act, 1860: "Where by reason of the size of the map annexed to any instrument of apportionment, or other circumstances, the Commissioners shall be of opinion that it is expedient that such map should be detached and held separate from the said instrument, the Commissioners may by an order under their hands direct that the said map shall be so detached; . . . . and thereupon every map so detached shall have the same force and effect and be referred to as if the same were annexed to the said apportionment." In this case the application

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to the justices only related to the map. No proceedings have been taken with regard to the instrument of apportionment itself, which the case states was in the possession of a Mr. Samuel Pett at the time when the Local Government Act, 1894, came into force, but where it is now we are not informed. The justices have found that the map is an integral part of the instrument of apportionment and that the appellant was in unlawful possession of the map by reason of an alteration in the law with regard to the possession of sealed copies of tithe apportionments which has been effected by s. 17, sub-s. 8, of the Local Government Act, 1894. [The learned judge read s. 17, sub-s. 8, and continued :] It appears that in 1910 a question arose as to the custody of the map, and the county council suggested that it should be kept in a box in the school and that the parish council and the schoolmaster should have keys of the box, and arrangements were made for the inspection of the map by persons who desired to inspect it, under certain conditions. These suggestions were adopted by the parish council, and the map was placed in a tin box in the school. On September 7, 1916, the appellant removed from the box two sections of the map. On March 17, 1917, the county council made an order that the map should be kept in the school, and it is that order which the respondent sought to enforce in these proceedings, the contention being that by reason of that order the appellant's possession of the map was unlawful. In my opinion the order of the county council was not a valid order. It relates only to the map and not to the sealed copy of the instrument of apportionment, but the effect of the sections of the Tithe Act, 1836, to which we have been referred, and of s. 26 of the Tithe Act, 1860, is that the apportionment and the map must be regarded as one document. A county council has power under s. 17, sub-ss. 8, 9, of the Act of 1894 to make an order for the custody or preservation of documents or papers, not of portions of documents or papers, and I can find nothing in that section authorizing a county council to order that a map shall be deposited in one place when the instrument of apportionment is deposited in another. Therefore, even if the jurisdiction of the justices is ousted by an order made by a county council, their jurisdiction was not ousted in this case, because the county council never had made any order for the custody of the sealed copy of the instrument of apportionment, of which the map

formed part, but of the map only, and in my view a valid order for the custody of a map, as distinct from the instrument of apportionment, can only be made when there has been an order of the Commissioners duly made under s. 26 of the Act of 1860 detaching the map from the apportionment. It would, in my opinion, be monstrous if orders could be made that different portions of an instrument of apportionment were to be kept in different places so that one document might be distributed over various areas. I cannot conceive anything more likely to contribute to the loss or destruction of the document. I have therefore come to the conclusion that the justices were wrong in holding that the order of the county council was final and conclusive, and this appeal must be allowed.

Avory J. I agree that this appeal must be allowed. The justices have adjudged and determined two things: First, that the two sections of the map were an integral part of the sealed copy of the instrument of apportionment. I agree as to this for the reasons given by my Lord, and I only wish to add that ss. 55 to 60 of the Act of 1836 and s. 26 of the Act of 1860 clearly establish that the map is an integral part of the tithe apportionment. The justices determined, secondly, that they were not entitled to consider any evidence with regard to the place of deposit or the security or preservation of the map, or with regard to the convenience of persons interested, because in their opinion the order of the county council was conclusive as to these matters, and they accordingly ordered that the map should be delivered up by the appellant to the parish council. I think that part of their decision was wrong. To uphold that decision would be to hold that s. 28 of the Act of 1860 has been impliedly repealed by s. 17 of the Local Government Act, 1894, and that, indeed, is the result of the argument for the respondent. It is said that because under sub-s. 8 of s. 17 a parish council in the first place, and a county council in the second place, may determine the place in which a document of this description shall be deposited, therefore the justices have no jurisdiction under s. 28 of the Act of 1860 to make any other order; in other words, that their duties under that section are now purely ministerial. The effect of that argument is to repeal that part of s. 28 which provides that the justices in making an order for the removal or deposit of the

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sealed copy of an instrument of apportionment shall have "reference to the security and due preservation of such copy and to the convenience of the parties interested therein." The argument must go the length of saying that the justices are not to have regard to any of those matters, but are merely to follow and enforce the order of the county council.

It appears to me that this is a case in which one must apply the well-known maxim "generalia specialibus non derogant"; in other words, that a general Act is to be construed as not repealing an earlier Act directed to a special object or to a special class of objects. The Tithe Act of 1860 was beyond question directed to a special object, and therefore, unless there is something in the later general Act, the Local Government Act, 1894, indicating a clear intention to interfere with the provisions of the earlier special Act, or unless the provisions of the later Act are so inconsistent with the provisions of the earlier Act that the two Acts cannot stand together, the provisions of the Act of 1860 are not repealed by the Act of 1894. There is in my opinion nothing in the Act of 1894 to show an intention to interfere with the Act of 1860, nor is there any inconsistency between the two Acts. It is quite possible that a county council may have made an order for the custody of a tithe apportionment, and that when the matter comes before the justices it can be shown that the circumstances have changed or that fresh facts have been ascertained which had not been brought to the attention of the county council. The circumstances of the present case afford an excellent illustration of that argument, for the case is one where the county council made an order for the custody of one portion of a public document apparently without any reference to the custody of another, and equally important, portion of the same document. That circumstance might be a reason why the justices in the exercise of their discretionary jurisdiction under s. 28 of the Act of 1860 might conceivably come to the conclusion that the order of the county council was not the best form of order for ensuring the security and preservation of the document in question or the convenience of the parties interested.

I desire to say with reference to *Lewis* v. *Poole* (1) that I do not assent to the view expressed by Wright J. that "the Act of 1894

(1) [1898] 1 Q. B. 164, 169, 170.

has changed the character of the jurisdiction " of the justices " from a discretionary to a ministerial jurisdiction." It is clear that that was not intended to be a concluded opinion, for Wright J. stated that he did not decide that point. I agree with what Kennedy J. said, that " we ought not to do more than send the case back with the statement of our view that the justices had jurisdiction to make the order applied for." Kennedy J. also referred to the weight which the justices ought to attach to the direction of the parish council. I do not disagree with that. The justices in this case will no doubt attach weight to the views of the county council as expressed in their order, but, as I have already said, it is possible that the justices may find that circumstances exist which justify them in taking a different view. It is in any case most desirable that before the matter is reheard a similar application under s. 28 should also be made against the person who has possession of the sealed copy of the instrument of apportionment so that the question of the custody of both portions of the document may be dealt with at the same time and as a whole. I desire also to point out that the case of *Lewis* v. *Poole* (1) is a distinct authority for the proposition that s. 17 of the Tithe Act, 1846 (9 & 10 Vict. c. 73), has not been repealed by s. 17, sub-s. 8, of the Act of 1894. Sect. 17 of the Act of 1846 provides that if the place of deposit of a confirmed instrument of apportionment is alleged to be inconvenient or unsafe, quarter sessions may, on the application of a person interested, order the removal of the document to such other place of deposit as the Court, " having reference to the security and due preservation of such copy and to the convenience of persons interested therein, may think fit." Wright J. said (2): " Although the court of quarter sessions might have made an order for that purpose, and possibly by such order have rendered an application like the present one no longer possible, they have not in fact been asked to make such an order, and have never made one. They have never exercised their jurisdiction in that respect." Wright J., therefore, assumed that the jurisdiction of quarter sessions under s. 17 of the Act of 1846 still existed and had not been impliedly repealed by s. 17 of the Act of 1894. If so, it is clear that the jurisdiction of the justices under s. 28 of the Act of 1860, the language of which is

(1) [1898] 1 Q. B. 164, 169, 170. (2) [1898] 1 Q. B. 168.

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identical with that of s. 17 of the Act of 1846, has also not been impliedly repealed by the Act of 1894. In my opinion the case must be remitted to the justices for them to exercise their jurisdiction in the matter.

SHEARMAN J. I agree, but I base my judgment solely on the ground that the justices were wrong in holding that their jurisdiction under s. 28 was purely ministerial. It is conceded that by reason of the order of the county council the appellant was not lawfully entitled to the possession of the map. But the matter does not end there. Although the parish council was legally entitled to the possession of the map, when proceedings were taken under s. 28 the justices had to exercise, not an absolute, but a discretionary jurisdiction. It is said that s. 28, or at any rate so much of s. 28 as gives the justices a discretion, must be deemed to have been impliedly repealed by s. 17 of the Act of 1894, but there cannot be a repeal by implication unless the two statutes are obviously inconsistent. For one thing sub-s. 8 of s. 17 deals with the custody of documents apart from the question of access; but s. 28 deals with custody and access together, for it expressly provides that in determining the place of deposit the convenience of persons interested is to be taken into consideration. It is therefore impossible, in my opinion, to hold that s. 17, sub-s. 8, is so inconsistent with s. 28 that it must be taken to have repealed it by implication. That being so, there are in existence two concurrent jurisdictions. There are two tribunals, each of which has power to make an order as to the custody of an instrument of apportionment. It does not seem a very sensible or convenient arrangement, but it is one which is not unknown to the law. For example, there are cases in which both the Divorce Court and the Court of Chancery exercise jurisdiction with regard to the same infants. I am quite sure that when the justices come to reconsider this matter they will bear in mind the principles which ought to govern a Court when exercising a concurrent jurisdiction. They should not differ from the decision of the other tribunal unless they have strong grounds for doing so. As Wright J. said in *Lewis* v. *Poole* (1), "The justices ought to attach the greatest weight to the direction of the parish council,

(1) [1898] 1 Q. B. 169.

affirmed by the county council," and Kennedy J. agreed with what Wright J. had said in this respect.

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DARLING J. I wish to add that I entirely agree with what Avory J. has said as to the meaning and effect of s. 28 of the Act of 1860.

Appeal allowed; case remitted to justices.

Solicitors for appellant: *Church, Rendell, Bird & Co., for Seldon & Lefroy, Barnstaple.*

Solicitor for respondent: *Arnold Carter, for Dunn & Baker, Exeter.*

F. O. R.

PULLEN, APPELLANT *v.* CARLTON, RESPONDENT.

1918

April 29.

Army—Stores—Detention—Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 156, *sub-s.* 1.

By s. 156, sub-s. 1, of the Army Act, 1881, "Every person who—(*a*) buys, exchanges, takes in pawn, detains, or receives from a soldier, or any person acting on his behalf, on any pretence whatsoever . . . . any of the property following; namely . . . . stores in regimental charge, or any provisions or forage issued for the use of an officer or soldier . . . . shall, unless he proves either that he acted in ignorance of the same being such property as aforesaid, or of the person with whom he dealt being or acting for a soldier, or that the same was sold by order of a Secretary of State or some competent military authority," be liable to conviction:—

Held, that whereas the section makes it an offence for a person to receive any of the goods mentioned in the section from a soldier, it makes it an offence for a person to buy, exchange, or take in pawn such goods from any person, or to detain such goods; that the word "detains" as used in the section meant the adverse withholding of possession of the goods from the Government, and does not bear the technical meaning applied to it in an action of detinue, and that therefore it was not necessary to prove that there has been a demand for the goods and a refusal to deliver them up.

CASE stated by justices.

Charges were preferred by the respondent, the chief constable for the city of Canterbury, against the appellant for detaining a quantity of provisions issued for the use of an officer or soldier,

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contrary to s. 156, sub-s. 1, of the Army Act, 1881; and also for being in possession of a quantity of public stores, to wit, a quantity of jam, contrary to s. 7 of the Public Stores Act, 1875. A third charge of being found in unlawful possession of the jam contrary to s. 156, sub-s. 2, of the Army Act, 1881, was also preferred against the appellant, but was not adjudicated upon.

Upon the hearing of the charges on January 12, 1918, the following facts were admitted or proved in evidence: (*a*) In or about November, 1914, the appellant purchased from a Quartermaster-Sergeant Passmore, of the West Kent Yeomanry, then stationed near Canterbury, two cases of jam containing together over 200 lbs. of jam, and paid for them by her cheque made payable to Passmore. (*b*) The jam was duly delivered to the appellant at her house in or about November, 1914, and (save for a small portion consumed or otherwise disposed of during the intervening time) remained in her possession at her house until it was seized and removed as hereinafter stated. (*c*) On January 11, 1918, the police, acting under a search warrant, visited the appellant's house and found 187 lbs. of the jam in an unlocked cupboard in the house, and they there and then seized and removed the jam and apprehended the appellant, charging her with being in unlawful possession of the same. (*d*) The jam was Government provisions issued to the troops, and was in tins similar to those issued to the troops overseas, and the value was 8*d*. per pound. (*e*) There was no authority for Government provisions, such as the jam in question, to be sold or disposed of to the civilian population, and the only person who had authority to give an order for the sale of such provisions was a Secretary of State or some competent military authority. And further, the appellant had no right to retain in her possession this jam, which was Government provisions issued to the troops.

It was contended on behalf of the appellant that although she had committed an offence under s. 156, sub-s. 1 (*a*), of the Army Act, 1881, yet she could not be convicted of the offence provided it was proved on her behalf that the jam in question was sold by order of a Secretary of State or some competent military authority.

The respondent contended that on the facts proved the appellant

could be convicted of an offence against s. 156, sub-s. 1 (*a*) (1), of the Act.

The justices found on these facts that the appellant had committed an offence under s. 156, sub-s. 1 (*a*), of the Army Act, 1881, inasmuch as she failed to prove (1.) that she acted in ignorance of the goods being provisions issued for the use of a soldier, or (2.) that she acted in ignorance of the person with whom she dealt being a soldier, or (3.) taht the provisions were sold by order of a Secretary of State or some competent military authority, as mentioned in s. 156, sub-s. 1, of the Act, and they therefore convicted the appellant and imposed the maximum penalty under the sub-section, namely, a fine of 20*l.* and treble the value of the provisions, namely, 18*l.* 14*s.*

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct determination in point of law.

A. E. Woodgate, for the appellant. There was no evidence that the appellant had been guilty of the offence under s. 156, sub-s. 1 (*a*), of the Army Act, 1881, of detaining the jam from a soldier. In order that a person may detain goods he must not merely be in possession of the goods; there must be an adverse or wrongful withholding of the goods so that the owner is prevented from having the possession of them: *Clements* v. *Flight*. (2) The appellant having bought the jam from a soldier, cannot be charged with detaining the jam from the soldier, as the two sets of facts are inconsistent. The words "from a soldier" must be read after each of the words in s. 156, sub-s. 1 (*a*), "buys," "takes in pawn,"

(1) Army Act, 1881, s. 156, sub-s. 1: "Every person who—(*a*) buys, exchanges, takes in pawn, detains, or receives from a soldier, or any person acting on his behalf, on any pretence whatsoever . . . . any of the property following; namely, ... stores in regimental charge, or any provisions or forage issued for the use of an officer or soldier . . . . shall, unless he proves either that he acted in ignorance of the same being such property as aforesaid, or of the person with whom he dealt being or acting for a soldier, or that the same was sold by order of a Secretary of State or some competent military authority, be liable on summary conviction, in the case of the first offence, to a fine not exceeding twenty pounds, together with treble the value of any property of which such offender has become possessed by means of his offence; . . . ."

(2) (1846) 16 M. & W. 42.

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"detains," "receives." There was no evidence that the appellant was ever asked by the soldier to return the jam or that she refused to do so; therefore there was no evidence that she was wrongfully withholding the goods.

Giveen (*G. A. H. Branson*, with him), for the respondent. In order that the offence under s. 156, sub-s. 1 (*a*), of the Army Act, 1881, of detaining goods should be committed it is not necessary that the goods should be detained from a soldier. The words "from a soldier" only apply to the word "receives," and not to the earlier words of the paragraph. The section is dealing with Army stores, and it is sufficient in order that the offence of detaining goods should be committed that they should be detained from the Government. It is true that detention means detention against the will of some one, but the artificial rule of evidence which is applicable to an action of detinue does not apply to such a case. It cannot be said that a person who is in possession of Government provisions issued to the troops which she has obtained from a soldier is not detaining them from the Government when she cannot prove that she comes within the exceptions mentioned in sub-s. 1 of s. 156.

A. E. Woodgate in reply. The definition of "detains" as withholding goods against the will of some one is not a mere technical meaning of the word; it is the ordinary definition of the word. In the present case it must mean detention against the will of the soldier, of which there is no proof. If it means detention from the true owner, time began to run from the moment the goods were received, and the proceedings are now out of time.

DARLING J. I think this appeal fails. The point which has been argued by Mr. Woodgate is not the point raised on the case. I am not quite certain what point the justices desired to raise. I think sub-s. 1 of s. 156 of the Army Act, 1881, upon the construction of which this case turns, is a very difficult section to construe. The offence created by that sub-section is punishable with a 20*l.* fine, and is therefore a more serious offence than the offence created by sub-s. 2 of that section. Sub-s. 1 makes it an offence for any person to buy, exchange, or take in pawn Army stores from any person, and also makes it an offence for any person to detain such stores, or to receive them from a soldier or any person acting on his behalf,

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unless the accused proves one of the excuses set out in the section. I think that this sub-section should be read in the way I have just read it; the offence of receiving is committed by any person who receives goods which come within the section from a soldier; but that as regards the other offences referred to in the sub-section an offence is committed by any person who buys such goods from any person at all, exchanges such goods with any person at all, takes such goods in pawn from anybody at all, or detains such goods.

Now what is the meaning of the word "detains"? Mr. Giveen does not contend that it means simply keep or retain, and I cannot see the slightest reason to suppose it means obtain, though the word "obtain," which is a totally different word, is used in sub-s. 2. Mr. Giveen says that "detains" means withholding adversely. I agree with that definition. Mr. Woodgate, however, contends that there must be imported into it all the incidents requisite to support the technical action for detinue as distinguished from an action for conversion. I do not agree. I think that the word "detains" as used in this section means withholding adversely to the rights of the Government. If there is evidence of that, I think the word "detains" is satisfied. In the present case there was ample evidence before the justices that the appellant adversely withheld the goods from the Government. She had got them from a soldier; she had interfered with the rights of the Government over them, because she had actually consumed some of the jam and withheld from the Government that which had not been consumed. It is not necessary to inquire into the state of her mind with regard to it. I have come to the conclusion that what she did amounted to a detaining of these goods in the sense in which this word is used in the Act of Parliament. I myself do not think that the word "detains" is used in the only sense in which it would probably have satisfied the Court of Exchequer in the days when Meeson and Welsby were reporters, but people are by no means so accurate now in the use of words as they were then, and I do not think Parliament in all its history was ever so accurate in its language as the old Court of Exchequer.

AVORY J. I am of the same opinion. It is not surprising that Mr. Woodgate should have asked this Court to deal with this case on

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a point not really stated in it, because the only point stated in it is nonsense and is not arguable at all. I think, however, it was open to Mr. Woodgate to argue, as he has done, that the conduct of the appellant does not amount to detaining within the meaning of this section, because it appears on the case that she was charged with detaining a quantity of provisions, and the justices say that they convicted her of the said offence under s. 156, sub-s. 1, so it is clear that they did convict her of detaining. I agree entirely with what Darling J. has said as to the proper construction of the word "detains" in this section. It ought not to be construed in the technical sense in which it is used in an action of detinue; that is to say, it is not necessary to prove for the purpose of this offence that there has been a demand and a refusal to deliver up the goods. I myself am not troubled with the fact that under sub-s. 2 the appellant might apparently also have been convicted of being in possession of the stores. It seems to me that sub-s. 2 is analogous to the case of unlawful possession of goods, an offence of which a person may be convicted though there is no strict proof of the ownership of the goods or of the fact of their having been stolen. In this case, in my opinion, the appellant detained this jam adversely from the Secretary of State for War or from the Army Council, in whom the property is now vested, from the time when she received it, except, of course, that portion of it which she had consumed. She has been committing a continuing offence and was liable to be convicted of it at the date charged.

SHEARMAN J. I am of the same opinion. I do not think that the true construction of sub-s. 1 (*a*) of s. 156 of the Army Act, 1881, is at all clear; but I think it is the duty of the Court to put a common sense and not a highly technical construction upon it.

It has been argued in this case that the word "detains" in this section means detaining from an individual soldier some of the individual soldier's property, and that it does not allude to a person being in possession of Army stores and holding adverse possession of those stores from the proper person who ought to have the custody of them. I think it would be highly technical to give the word such a limited construction. The facts of this case are that the appellant some years ago bought some jam part of Army stores

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and consumed part of it from time to time, and within six months before the issue of the summons was keeping that portion which had not been consumed in her cupboard. Clearly the jam ought not to have been in her cupboard; it ought to have been returned; the man who sold it had no right to sell it, and she bought property to which he had no title whatever. She was keeping it and using it adversely to the true owner. I think that she was detaining the jam within the meaning of this section, and within the six months before the summons was issued. I think that is the fairest, best, and most sensible meaning to put on the words. That is the meaning the justices put upon them. I think that they were right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Kingsford, Dorman & Co., for Kingsford, Arrowsmith & Wightwick, Canterbury.*

Solicitor for respondent: *Treasury Solicitor.*

R. F. S.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1917 *Dec.* 4.

C. A. 1918 *May* 8, 9.

ARTIZANS LABOURERS AND GENERAL DWELLINGS COMPANY, LIMITED *v.* CLIFFORD.

County Court—Landlord and Tenant—Summons for Possession—Person holding "by, through, or under" the Tenant—Wife of Tenant—Substitution of Defendant—Stage of Proceedings—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 138—*County Court Rules,* 1903, *Order* XIV., *r.* 2.

By s. 138 of the County Courts Act, 1888, where the term and interest of the tenant of any corporeal hereditament of a certain value shall have been determined by notice to quit, and the tenant or any person holding or claiming by, through, or under him shall refuse to deliver up possession, the landlord may enter a plaint against the tenant or against such person so refusing for the recovery of the premises, and thereupon a summons shall issue to such tenant or such person so refusing; and the judge may in certain events order that possession of the premises be given by the defendant to the plaintiff, and if the order is not obeyed the registrar shall issue a warrant for possession.

By Order XIV., r. 2, of the County Court Rules, 1903, the Court may, at any stage of the proceedings, order that the names of

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any parties improperly joined as defendants be struck out and that the names of any parties be added as defendants who ought to have been joined.

A tenancy having been determined by notice to quit, the wife of the tenant refused to deliver up possession. The landlords entered a plaint against the tenant, who was with the Army abroad, and served a summons irregularly at the premises. On the hearing of the summons the tenant did not appear, and the county court judge under s. 138 of the Act made an order for possession in default of appearance. The tenant by his solicitor moved to set aside this order on the ground that he had not been served with the summons. The judge, under Order XIV., r. 2, of the County Court Rules, substituted the tenant's wife as defendant to the plaint and subsequently made an order for possession against her :—

The tenant having obtained in chambers a writ of prohibition prohibiting the landlords from proceeding with the order for possession :—

Held, that the tenant's wife was a person holding or claiming by through, or under the tenant within the meaning of s. 138 of the Act.

Held, also, that although the service of the summons for possession upon the tenant was invalid, his application to set aside the order made against him was a stage of the proceedings and that the county court judge had power under Order XIV., r. 2, of the County Court Rules to substitute the tenant's wife as defendant.

APPEAL from an order for a writ of prohibition made by Low J. in chambers.

The plaintiffs were the owners of a house No. 19, Portman Buildings, Lisson Grove, London, portion of which had been let in January, 1915, on a weekly tenancy at 8*s*. 6*d*. a week to Frederick Sydney Clifford.

In October, 1915, F. S. Clifford joined the Army. In February, 1916, he was sent to France, and in his absence his wife and child occupied the premises. The rent fell into arrear, and on May 19, 1917, a notice to quit addressed to F. S. Clifford was properly served on the premises terminating the tenancy on May 28. Notwithstanding this notice Mrs. Lilian Clifford, the wife of F. S. Clifford, remained in occupation and refused to give up possession.

On May 29, 1917, a plaint was entered in the Marylebone County Court under s. 138 of the County Courts Act, 1888 (1), by the plaintiffs against F. S. Clifford to recover possession of the premises. The summons was served upon a young girl apparently less than

(1) See note on p. 226, post.

sixteen years old, who stated that F. S. Clifford was serving in the Army. On June 14 the summons was heard. Mrs. Clifford was present at the hearing, but F. S. Clifford did not appear, and the county court judge gave judgment in default of appearance and made an order that possession should be given up on July 2.

On June 26, 1917, an application was made in the county court by a solicitor on behalf of F. S. Clifford to set aside the order for possession on the ground that the summons had not been properly served on him. The county court judge was of opinion that the service was bad, but that under s. 138 of the County Courts Act, 1888, a landlord can enter a plaint against any person claiming under the tenant and neglecting or refusing to give up possession. Accordingly under Order XIV., rr. 2 and 11, of the County Court Rules, 1903, he substituted Mrs. Clifford as the defendant in the action and ordered that the action so constituted should be set down for hearing on July 10.

On that day the county court judge made an order that possession should be given up on July 30.

On July 24, 1917, solicitors on behalf of F. S. Clifford issued a summons in chambers for a writ of prohibition to prohibit the plaintiffs from further proceeding upon the order of July 10 on the ground that the county court judge had no jurisdiction to make that order.

On July 30, 1917, Low J. in chambers made an order for the issue of a writ of prohibition prohibiting the registrar of the county court and the plaintiffs from further proceeding in the matter of the order for possession.

The plaintiffs appealed.

Hogg, K.C., and *F. Hinde*, for the appellants. The learned judge in chambers held that a wife was not a person "holding or claiming by, through, or under" the tenant within the meaning of s. 138, inasmuch as her possession was, in his view, the possession of her husband, who is not now a party to the action. But the words "holding or claiming by, through, or under" are intended to include all persons who do not claim adversely to the tenant. It is submitted that Mrs. Clifford holds by her husband within the meaning of the section. This enactment does not affect the title of any

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person not served with the summons, but merely provides a summary method of obtaining possession from persons served: *Campbell* v. *Loader* (1); *Hodson* v. *Walker*. (2) The rights of F. S. Clifford, the husband, are not interfered with.

Fox-Davies, for the respondent. The judge in chambers was right. A husband holds by his wife, not the wife by the husband. The order of the county court judge, if executed, will be a great hardship on the husband. The words of s. 138 should therefore be strictly construed to avoid the result of breaking up a man's home in his absence. Strictly speaking a wife does not hold or claim by, through, or under her husband. If so, the county court judge had no jurisdiction to make the order for possession.

Secondly, the county court judge had no jurisdiction to substitute the wife for the husband as defendant. He could only do this under Order XIV., r. 2, of the County Court Rules, 1903, "at any stage of the proceedings." Here the proceedings were a nullity from the beginning. It is conceded on all hands that the summons for possession was improperly served. There was therefore no defendant, and consequently no one in whose place the wife could be substituted as defendant, and no one on whom the order of substitution could be served as directed by Order XIV., r. 11.

Hogg, K.C., in reply. The husband appeared and moved to set aside the order for possession. That appearance constituted a "stage of the proceedings," and the county court judge had therefore jurisdiction under Order XIV., r. 2, to substitute the wife as defendant.

A. T. LAWRENCE J. I have great doubt whether this case comes within Order XIV., r. 2, of the County Court Rules, 1903, and whether the county court judge had any jurisdiction to substitute the wife for the husband as the defendant in the action; but my brother has no doubt on the point, and I am not prepared to differ from him. There is much force in what Mr. Fox-Davies has said as to the hardship upon a man serving abroad whose home is about to be broken up and who has little power of seeing to it that his wife pays the rent when she refuses to do so. It may be true that technically his title to the premises is not injured, but it is not true to say

(1) (1865) 3 H. & C. 520. (2) (1872) L. R. 7 Ex. 55.

that he is not otherwise affected if vacant possession is delivered to the landlord, not only his wife but his child evicted, and his property broken up. His interest in life is affected. Therefore I feel the greatest reluctance in allowing such a harsh proceeding; but I cannot see my way to holding as a matter of law that the county court judge had no jurisdiction to take the course he has adopted. The appeal must be allowed and the order for a prohibition reversed.

SHEARMAN J. I am of the same opinion, that the order for a prohibition must be reversed. The short facts are these: Subsequent to the war the husband, F. S. Clifford, took a tenancy of some premises in Lisson Grove and subsequently went to the war. When he had gone he left his wife in possession of the premises. We are told that the wife sub-let a portion of the premises, but she stopped on and did not pay the rent. Proceedings were then taken under the present County Courts Act, not for ejectment, but for possession upon the interest of the tenant having been properly determined. The landlords properly served a notice to quit and, when that had expired, the tenancy of this soldier had determined. The landlords then took out a summons under the provisions of the Act against the husband. It was served upon the premises; he did not appear, and judgment was signed. After judgment was signed the husband did appear. He appeared and protested and issued a summons and brought the other party before the Court, and the judge of the county court on the hearing came to the conclusion that the husband had not been properly served and set aside the judgment. Upon hearing the real facts that the wife was in possession enjoying the sub-rent and not paying the head rent, the county court judge said: "I shall under Order XIV., r. 2, substitute the wife as defendant." I need not read the rule, because it is exactly the same as the High Court rule. He said: "You have the wrong defendant here; I shall order the wife to be substituted"; and in accordance with the provision of the rule he directed that a proper notice under the rule should be served on the substituted defendant.

The point which was not taken before the judge in chambers, and which we hear for the first time to-day, is that the judge had

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no power to do that, though the rule says the Court may at any stage of the proceedings order a defendant to be added or substituted. Whether he was wise to do it, or whether he would not have been wise to dismiss the action and deal with the costs according to the merits, and tell the solicitor to bring another action, is not the question; the question is, if he had jurisdiction to do it. The wife was represented; the whole of the case was gone into; and, after hearing the facts and merits, the judge directed judgment to be signed against the wife and gave leave to issue a warrant of possession. Then an application was made for a writ of prohibition, not by the wife on the ground that there was no jurisdiction to serve her, but by the husband; and, on the affidavits filed, the only point taken before Low J. in chambers was that there was no jurisdiction to issue this order because it was the man's wife who was sued. The provisions of the County Courts Act are to the effect that when the interest of the tenant has been determined by notice to quit and the tenant, or any person claiming by, through, or under him, shall neglect or refuse to deliver up possession, the landlord has an option to sue not merely the tenant, but any person holding or claiming by, through, or under him. The learned judge was of opinion that the wife was not a person holding by, through, or under the tenant, her husband. That is a bare point of law on which, after the argument here, I think it is clear the judge was wrong. I think the words are comprehensive of every class of person claiming under a superior person. "Under" points to undertenants; "through" to title by devolution; "by" to title by representation. Here I think it is clear the wife was holding by the husband, and that her husband's title was her sole right of possession.

When this case came before us a fresh point was taken by Mr. Fox-Davies. He conceded the tenancy had been duly determined, but said there was no power in the judge, after the husband had taken steps to have himself struck out,—that is to say, had entered a conditional appearance for the purpose of objecting to the jurisdiction, after the order was made and the facts were before the Court—to substitute the wife who was really in possession, under the Act, because it was not a stage of the proceedings. It was a very wide exercise of discretion, I agree; but it seems to me it was within his powers and within the range of his discretion, and therefore he

had jurisdiction. I think the point before the judge and the new point here are bad; that the county court judge had jurisdiction, and therefore prohibition should not be issued, and the order must be reversed.

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The tenant (the respondent in the Divisional Court) appealed.

Whitmore Richards and *Fox-Davies*, for the tenant. First, the county court judge had no jurisdiction to substitute the name of the tenant's wife for that of her husband as the defendant to the action. Order XIV., r. 2, under which the judge purported to act, does not use the word "substitute." Even if what the judge did can be regarded as adding the wife as a defendant and striking out the husband, there was no power to do that as the husband had not been served. The rule gives power to strike out the name of any party "improperly joined"; here the husband was properly made a party and he had not been served. Further, the landlords exercised the option given them by s. 138 of the County Courts Act, 1888, by electing to proceed against the husband, and having done so they cannot now proceed against the wife.

Secondly, the county court judge misconstrued s. 138 of the County Courts Act, 1888, by deciding that the wife was "holding or claiming by, through, or under" the tenant. Those words refer to a person, for example, a sub-tenant, who claims some title derived from the tenant. In this case the wife never set up a title in herself; her possession was that of her husband. In an action of ejectment the proper defendants are those persons who occupy any part of the property as tenants or undertenants: Cole on Ejectment, p. 75; "mere friends and visitors of the tenant in possession, and his wife, children, and servants, do not *occupy as tenants*, and therefore should not be included in the writ as defendants": ibid., p. 76; *Bertie* v. *Beaumont* (1); *Doe* v. *Staunton*. (2) The text-books treat s. 138 as limited to proceedings against a tenant or a sub-tenant: see Woodfall's Law of Landlord and Tenant, 19th ed., p. 943; Foa's Law of Landlord and Tenant, 5th ed., p. 772. It cannot, therefore, apply where it is sought to get possession from a trespasser. In any

(1) (1812) 16 East, 33. (2) (1819) 1 Chit. 118; 2 B. & Al. 371.

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view the landlords cannot get vacant possession as they are not entitled to turn out the tenant's furniture, seeing that the tenant is not a party to the action.

Hogg, K.C., and *F. Hinde*, for the landlords. On the first point: it is to be remembered that this is an application for a prohibition. That writ lies only where a subordinate tribunal has no jurisdiction at all to deal with the particular matter. Here the county court judge had jurisdiction to add the wife as a defendant and to strike out the name of the husband. Even if the procedure was irregular, the irregularity could be cured—see Order LIV., r. 24—and it does not affect the judge's jurisdiction.

On the second point: the words "holding or claiming by, through, or under" the tenant in s. 138 of the County Courts Act, 1888, are not limited to the case of a person having an estate or interest derived from the tenant. An examination of the statutes which from time to time have governed the procedure for recovering possession of small tenements shows that the words "person holding or claiming by, through, or under" the tenant have not the limited meaning now sought to be attributed to them. In s. 1 of the Small Tenements Recovery Act, 1838 (1 & 2 Vict. c. 74), and in s. 122 of the Act for Recovery of Small Debts, 1846 (9 & 10 Vict. c. 95), a landlord was empowered to proceed against the tenant or the person in actual occupation, thus pointing to the case of a sub-tenant or assignee; but that language was altered in s. 50 of the County Courts Act, 1856, where it is the same as that used in s. 138 of the present Act. The words have thus been made more extensive.

[BANKES L.J. In this case the wife sets up no claim against the landlords, and the tenant says "You cannot turn out my furniture by serving the summons on my wife."]

In the case where the premises are in the occupation of a sub-tenant, and judgment is obtained for possession under s. 138, the head-tenant's furniture, if still on the premises, can be turned out. The position is the same here; the wife cannot be in a better position than a sub-tenant. No right of the tenant has been violated seeing that notice to quit had been duly served and had expired; but if the tenant's rights were in any way violated he has his remedy, proceedings under the section not affecting the title of any person

not served with the summons: *Campbell* v. *Loader* (1); *Hodson* v. *Walker*. (2)

Whitmore Richards in reply. In *Hodson* v. *Walker* (2) Martin B. took the view that the words holding or claiming "by, through, or under" the tenant refer to some one deriving title from the tenant, as a sub-tenant. Here the wife did not get possession by the voluntary or involuntary act of the tenant; her possession was that of her husband. The county court judge has misconstrued s. 138, and, there being no appeal by the tenant, the remedy by prohibition is open: see per Pollock B. in *Reg.* v. *Lincolnshire County Court Judge* (3); see also *London Corporation* v. *Cox*. (4) On the first point, even assuming that the wife's name was first added as a defendant to that of the husband and then the husband's name struck out, the judge exceeded his jurisdiction, for before a defendant can be added there must be a defendant before the Court: see *In re Colbeck*. (5)

PICKFORD L.J. In this case I propose to say nothing regarding the merits or upon the point whether the county court judge was right as a matter of discretion in substituting the wife for the husband as a defendant. Those points are not before us. The sole question for us is, has the tenant shown that the county court judge acted without jurisdiction? If the tenant has failed to show that, we have no power to interfere. [His Lordship stated the facts, and continued:]

The case for the tenant rests upon two grounds: first, it is said that the county court judge had no power to substitute the wife for the husband as a defendant. In support of that contention it is said that Order XIV., r. 2, of the County Court Rules, which corresponds to Order XVI., r. 11, of the High Court Rules, does not use the word "substitute," and only gives power to add or strike out. It is evident, however, that the power there given is meant to include the substitution of one party for another, because r. 4 says that a person may be substituted if he admits that he is a person to be charged, and r. 11 says that "where a defendant is added or

(1) 3 H. & C. 520.
(2) L. R. 7 Ex. 55.
(3) (1887) 20 Q. B. D. 167.
(4) (1867) L. R. 2 H. L. 239.
(5) (1888) 36 W. R. 259.

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substituted, except where a defendant is substituted under rule 4 of this order, an order shall be drawn up." Rule 4 points clearly to the conclusion that although the word "substitution" is not used in r. 2, substitution is contemplated as something that may be done under that rule. The position is the same under the High Court Rules, Order XVI., rr. 11 and 12. As I have said, the word "substitute" is not used in Order XIV., r. 2, but when a county court judge says "I substitute one defendant for another" he must be taken to mean "I make such an order as it is possible to make under the rule by putting one defendant in the place of another." This may be done in several ways. The judge could add the wife in the first instance. There would then be two defendants, but as one of them—the husband—had not been served the judge could under r. 9 of the same order, strike his name out. Substitution has thus been effected strictly in accordance with the rules. It was admitted that this may be done where there are two defendants to begin with, but it was argued that it cannot be done where there is only one defendant to begin with, because, it was said, the first must be struck out before the second can be added. I do not agree. The judge can add before striking out. If his use of the word "substitute" was used in the sense I have indicated, as I think it was, it was quite correct, but even assuming that there was any irregularity, it could be cured under Order LIV., r. 24. In reply, a further point was raised on behalf of the tenant. It was said that the judge could not substitute the wife without giving notice to the defendant who had not been served, and *In re Colbeck* (1) was cited in support of that contention. That case was founded upon *Tildesley* v. *Harper* (2), where it was held, not that the adding of a party cannot be made ex parte, but that the proper and regular way of proceeding is to give notice. Even if there was any irregularity it could be cured; the matter would not go to the jurisdiction. Therefore I think that the point that the county court judge had no jurisdiction to substitute the wife as a defendant fails.

The other point turns on the construction of s. 138 of the County Courts Act, 1888. It is said that the wife was not "a person holding or claiming by, through, or under" the tenant; that those words refer only to a person who claims a title which has devolved

(1) 36 W. R. 259. (2) (1876) 3 Ch. D. 277.

upon him from the tenant—for example, a sub-tenant or an assignee; and that they have no reference to a person like the wife or servant of a tenant who is left in occupation in the absence of the husband or master. I think the words "by, through, or under" are meant to be as wide as possible. For the tenant to succeed he must show that there was no evidence before the county court judge on which he could say that the wife was claiming "by, through, or under" her husband. Of course, in order so to find the facts the judge must put upon the words the wider meaning which I attribute to them, and must not confine them to some one who is claiming a title by devolution or assignment or sub-lease. In this case the husband is serving in the Army, and there may be difficulties preventing him attending to his affairs and seeing that his wife pays the rent; but if the argument for him is right it applies just as much to the case of a person who has gone away for his own amusement, who cannot be found, and who has left his wife or servant in possession of the premises without paying any rent or seeing that it is paid, and then, when the tenancy has been determined by notice to quit, says "You cannot turn me or my wife or servant out because you must serve me first and you have not done so, although you do not know where I am." The words "holding or claiming by, through, or under" were never intended to be limited in the way suggested. I do not see why the word "by" does not mean "in the right of." In this case, what did the wife do? According to the affidavit made by the landlords' solicitor the evidence before the county court judge was, so far as material for this purpose, as follows: "The negotiations with the . . . . company's superintendent for the tenancy of the premises were made by . . . . Mrs. Clifford. That during the time the said Clifford had been in the Army his wife, Lilian Clifford, ... continued to occupy the premises. . . . . She received an allowance on account of the rent of the said premises. That the rent was irregularly paid, and had got into arrear notwithstanding that the said Lilian Clifford is receiving Army pay, and that the wife had threatened and boasted that no rent would be paid, and that she should continue to occupy without paying rent; that no rent had been paid for three months and that there was then due to the landlords as rent a sum of 4*l.* 4*s.* for arrears of rent. . . . . That notwithstanding such notice [to quit] the wife remained in

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occupancy of the premises and refused to give up possession." Upon that the county court judge was entitled to say that the wife claimed to be in possession by right of her husband, and, that being so, there is an end of the matter.

A further point was advanced on behalf of the tenant. It was said that when s. 138 provides that "the landlord may enter a plaint, at his option, either against such tenant, or against such person so neglecting or refusing," to deliver up possession, it means that if he has issued a plaint against one person he cannot afterwards issue a plaint against another. I cannot reconcile that argument with the well-known rule as to claiming relief against defendants jointly, severally, or in the alternative.

I ought perhaps to say that if any wrong has been done to the tenant by the order made against the wife, or by anything done in carrying it out, he has his remedy. But, as no want of jurisdiction has been shown, the appeal fails.

BANKES L.J. I agree. The appellant is F. S. Clifford, who was the tenant of the premises of which the respondents are the landlords. The tenancy, which was at a rental of 8*s*. 6*d*. per week, was terminable at the instance of either party by notice in writing. A notice to quit was given by the landlords and had expired before these proceedings were commenced. Neither the husband nor his wife had therefore any right to remain on the premises, and if proceedings in ejectment had been taken, apart from the difficulty about serving the husband, judgment could have been obtained, the effect of which would have been that both husband and wife would have had to leave the premises. The present appeal is therefore one more as to form than as to substance. The objection taken by the tenant to the form is that the county court judge had in the circumstances no jurisdiction to make any order entitling the respondents to vacant possession. The respondents elected to proceed by the summary process provided by s. 138 of the County Courts Act, 1888, which gives the landlord the option of proceeding against the tenant or any person who claims "by, through, or under" him. The landlords exercised the option by proceeding against the tenant, the husband, and the plaint was issued against him. When the matter came before the judge the point was taken that the summons

against the husband had not been properly served, and the judge upheld that contention, but he ordered the name of the husband to be struck out and the name of the wife to be added, summarizing that proceeding by calling it "substitution." If the judge had ordered the husband's name to be struck out because he had been improperly joined I think he would have acted without jurisdiction: but the husband was not improperly joined; the only difficulty was that he had not been served. But under Order XIV., r. 2, of the County Court Rules, it was competent for the judge to have added the wife on the ground that she was a person whose presence would be necessary for enabling the tenant to be ejected. The wife having been added as a defendant, there were then two defendants, and the judge could under r. 9 strike out the name of the husband on the ground that he had not been served. I see no reason for supposing that that is not the process which the judge really followed in his own mind and summarized by calling it "substitution." At the most, if the judge did anything wrong, it was a mere irregularity which under Order LIV., r. 24, could be cured. In these circumstances it cannot be said that there was no jurisdiction to add the wife and to strike out the husband.

The next point is this: if the wife was properly made a defendant, could the judge proceed to make an order under s. 138? That involves the construction of the words "by, through, or under" the tenant. Those words appear to me to include two classes of persons—first, a person who claims some right in himself derived from or under the tenant, and, secondly, a person who claims no independent right in himself but claims to retain possession in the right of the tenant. Here the wife claimed in the right of her husband, and it seems to me that the county court judge was entitled—whether I should have taken the same view myself is immaterial—to come to the conclusion that the wife was claiming to retain possession in the right of her husband. The judge had the right to take the course he did and to give the judgment which he gave against the wife, who at that time was properly before the Court. The appeal therefore fails.

SCRUTTON L.J. In this case the only question of general importance is whether the words "by, through, or under" in s. 138 of the

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County Courts Act, 1888, are limited to persons who have some derivative title from the original tenant, or whether they apply to persons who are in possession under colour of the original tenant's title though they have no independent interest derived from him? Translating that into practical language, is the wife or servant of a tenant who is on the premises because of the tenancy of the husband or master a person who claims or holds "by, through, or under" the tenant? In my view she is. The words are very wide, and I think were intended to allow the Court to deal with people who are in possession of the premises because of the tenant's title and because the tenant has put them there. If it were otherwise the tenant might go away and leave his wife or servant in the premises, and although the tenancy has been duly determined there would be no means of obtaining possession, because, according to the narrow construction sought to be put upon the words, the wife or servant had no independent title. On the view I have expressed the judge was well within his jurisdiction in making the order against the wife. On the other points, which appear to me to be of a purely technical character, I agree with the opinion expressed by the other members of the Court.

Appeal dismissed.

Solicitors for landlords: *Mann & Crimp.*
Solicitors for tenant: *J. & C. Dodd.*

J. S. H.

NOTE.—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 138: "When the term and interest of the tenant of any corporeal hereditament, where neither the value of the premises nor the rent payable in respect thereof shall have exceeded 100*l.* by the year, and upon which no fine or premium shall have been duly paid, shall have expired, or shall have been determined either by the landlord or the tenant by notice to quit, and such tenant, or any person holding or claiming by, through, or under him, shall neglect or refuse to deliver up possession accordingly, the landlord may enter a plaint, at his option, either against such tenant, or against such person so neglecting or refusing, in the Court of the district in which the premises lie, for the recovery of the same, and thereupon a summons shall issue to such tenant or such person so neglecting or refusing; and if the defendant shall not at the time named in the summons, show good cause to the contrary, then, on proof of his still neglecting or refusing to deliver up possession, ... the judge may order that possession of the premises mentioned in the plaint be given by the

defendant to the plaintiff, either forthwith or on or before such day as the judge shall think fit to name; and if such order be not obeyed, the registrar, whether such order can be proved to have been served or not, shall, at the instance of the plaintiff, issue a warrant authorising and requiring the bailiff of the Court to give possession of such premises to the plaintiff . . . ."

County Court Rules, 1903, Order XIV., r. 2: "No action or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the judge may in every action or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before him. The Court may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties be added, whether as plaintiffs or defendants, who ought to have been joined, or whose presence before the judge may be necessary in order to enable him effectually and completely to adjudicate upon and settle all the questions involved in the action or matter . . . . Every person whose name is so added as defendant shall be served with a notice in manner hereinafter mentioned, and the proceedings as against such party shall be deemed to have begun only on the service of such notice."

Rule 11: "Where a defendant is added or substituted . . . . an order shall be drawn up; and such order shall be served on the defendant, together with a copy of the summons, and a notice according to the form in the Appendix as to the day upon which he is to attend at the Court, according to the rules applicable to the service of the original summons in the action.

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May 14.

[IN THE COURT OF APPEAL.]

DANIEL *v.* ROGERS.
FANTINI, CLAIMANT.

Name—Business Name—Failure to register—Right to enforce Business Contract—Registration of Business Names Act, 1916 (6 & 7 *Geo.* 5, *c.* 58), *ss.* 1, 3; *s.* 8, *sub-s.* 1.

Sect. 8, sub-s. 1, of the Registration of Business Names Act, 1916, provides that where a person who is required to be registered under that Act makes default in so doing "the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise."

By an assignment dated January 9, 1917, the claimant, who carried on business in a name other than her true name but was not registered under the Registration of Business Names Act, 1916, purchased the goodwill of the business and stock-in-trade of one R., and thereupon entered into occupation of the premises where R. had carried on business and where, till a few weeks before July 4, 1917, his name continued to appear over the premises, although in fact his connection therewith ceased in January. On June 12, 1917, the stock-in-trade so purchased was taken in execution at the instance of a judgment creditor of R., and, being claimed by the claimant, an interpleader issue was tried on July 4, 1917, in which the claimant produced the assignment of January 9. It was contended by the execution creditor that the claimant was precluded by s. 8, sub-s. 1, of the Registration of Business Names Act, 1916, from enforcing any right to the goods. The county court judge gave judgment for the claimant and his decision was affirmed by the Divisional Court:—

Held, that s. 8, sub-s. 1, of the Act did not preclude the claimant from enforcing her right to the goods, for her right at the time of the claim rested on her common law title by possession and did not arise under or out of the assignment.

Semble, s. 8, sub-s. 1, is limited to prohibiting the enforcement of contracts, coming within its scope, as between the immediate parties thereto.

Decision of the Divisional Court [1918] 1 K. B. 149 affirmed.

APPEAL from a decision of the Divisional Court affirming a judgment of the judge of the Brompton County Court: reported [1918] 1 K. B. 149.

The plaintiff, Daniel, obtained judgment on January 31, 1917,

against one Rogers, who carried on business as a ladies' costume maker at 955, Fulham Road, and on June 12, 1917, certain goods at that address were taken in execution under the judgment. These goods were claimed by Miss Fantini as being her property. It appeared that by an assignment dated January 9, 1917, Rogers sold to Miss Fantini the goodwill and stock-in-trade (the goods actually seized) of the business at 955, Fulham Road. On January 17, 1917, Miss Fantini, who had carried on a similar business as Laurette at another address, took possession of the premises at 955, Fulham Road, and was carrying on the business there when the execution was levied, and she continued to use the name Laurette on her invoices. Till about three weeks before the date of the interpleader proceedings hereinafter mentioned, namely, on July 4, the name Rogers was over the premises, but it was then removed, and no name was put up in its place. Rogers's connection with the business in fact ceased in January. Miss Fantini, who had not registered herself under the Registration of Business Names Act, 1916 (1),

(1) Registration of Business Names Act, 1916, s. 1: "Subject to the provisions of this Act—

. . . . . .

"(*b*) Every individual having a place of business in the United Kingdom and carrying on business under a business name which does not consist of his true surname without any addition other than his true Christian names or the initials thereof . . . . shall be registered in the manner directed by this Act . . . ."

Sect. 3 prescribes the particulars to be furnished for registration.

Sect. 7 imposes a penalty upon any person required to be registered who makes default in so doing.

Sect. 8, sub-s. 1: "Where any firm or person by this Act required to furnish a statement of particulars . . . . shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise: Provided always as follows:—

"(*a*) The defaulter may apply to the court for relief against the disability imposed by this section, and the court . . . . may grant such relief" on certain conditions.

"(*b*) Nothing herein contained shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid . . . ."

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having claimed the goods, interpleader proceedings followed. At the trial of the interpleader issue on July 4, 1917, Miss Fantini gave evidence as to the purchase of the goodwill and stock-in-trade from Rogers, and she produced the assignment of January 9, 1917. The execution creditor contended, inter alia, that as the claimant was not registered under the Act of 1916 she was precluded by s. 8, sub-s. 1, of that Act from enforcing any right to the goods.

The county court judge gave judgment for the claimant. His judgment was affirmed by the Divisional Court, that Court holding that s. 8, sub-s. 1, of the Act of 1916 did not preclude the claimant from enforcing her right to the goods, for, although her right thereto was originally derived from the assignment of January 9, her right at the material time rested on her common law title by possession and did not arise under or out of the assignment.

The execution creditor appealed.

David, *K.C.*, and *Coumbe*, for the execution creditor. First, it must be taken that by s. 1 and s. 7 of the Act of 1916 contracts by persons who ought to be but are not registered are void. In two cases under the Workmen's Compensation Act, 1906, it has been decided that where the contract of employment contravened other statutes the employees could not claim compensation: see *Kemp* v. *Lewis* (1) and *Pountney* v. *Turton*. (2) So in this case the claimant cannot take advantage of a contract which the Act is obviously intended to prohibit being entered into by a person who is not registered. Secondly, s. 8 of the Act prohibits in terms the enforcement by action or other legal proceeding of a contract entered into by a person who is a defaulter under the Act. It was said by the Divisional Court that the claimant's title rested, not on the written assignment, but on her possession of the goods. That is not so. The Court must inquire, not only into the fact of her possession, but also into her right to possession. As Parke B. said in the course of the argument in *Gadsden* v. *Barrow* (3), "To maintain trover, the plaintiff must have either an absolute or a special property in the goods, and also the right of possession." Moreover, by producing

(1) [1914] 3 K. B. 543. (2) [1917] W. N. 353.
(3) (1854) 9 Ex. 514, 515.

the assignment in the interpleader proceedings the claimant made it part of her case, and clearly claimed "under" it.

[BANKES L.J. The contract between the claimant and Rogers had been completed. Is not s. 8 limited to a prohibition of the enforcement of a contract as between the parties to it?]

No, it prohibits any enforcement of it whatever. The words of the section are in the widest terms and effect must be given to them.

The goods were acquired from Rogers under the assignment, which, having been entered into by a defaulter under the Act and in relation to the business in respect of which registration was necessary, cannot by the terms of s. 8 be enforced.

A. H. Woolf, for the claimant, was not called upon.

PICKFORD L.J. In my opinion this appeal fails. The goods in question which were seized under an execution against one Rogers, who had been carrying on business as a ladies' costume maker, were claimed by Miss Fantini as her property. It appears that by a contract dated January 9, 1917, Rogers sold his business and stock-in-trade to Miss Fantini, who took possession on January 17, the balance of the purchase price being paid on January 23. On January 31 Daniel obtained judgment against Rogers, and for some unexplained but immaterial reason he did not put in execution till June 12, that is, nearly six months after Miss Fantini had been in possession of the goods she had bought from Rogers. In the interpleader proceedings the execution creditor contended that Miss Fantini, who was carrying on business as Laurette, but was not registered under the Registration of Business Names Act, 1916, as she ought to have been, was not entitled to claim the goods because the contract having been entered into in relation to the business could not be enforced against him. Both the county court judge and the Divisional Court held, and I think rightly held, that Miss Fantini was not enforcing or claiming to enforce this contract or any right under or arising out of it against the execution creditor, but that she merely said "These are my goods, I bought them; I have been in possession of them for six months, and you, the execution creditor, have no right to take them; and it does not matter, so far as you are concerned, whether the contract by which I got them from Rogers is or is not enforceable as between him and me." I entertain considerable

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doubt whether the Act of 1916 was ever intended to apply to the enforcement of a contract except as between the parties to it. The provisoes to s. 8, sub-s. 1, seem to me to point in this direction, certainly provisoes (*a*) and (*c*) do so; but it is unnecessary to decide this point, and I do not propose to do so. Even on the assumption, however, that the application of s. 8 extends beyond the immediate parties to a contract, I am of opinion that Miss Fantini was not enforcing a right under or arising out of the contract against the execution creditor. On her behalf it is said that she was in possession of the goods, and the fact that she was in possession of them by virtue of a contract which she could not enforce is quite immaterial as regards the execution creditor. On behalf of the execution creditor the case was argued as if the Act said that a contract in the circumstances of this case was void. The statute does not say so. If the contract were void the claimant would be thrown back upon bare possession. I do not say that would not be enough, until it was displaced. If the contract were void it might possibly be open to the execution creditor to say that the goods in question were Rogers's goods. That point, however, does not arise, for Parliament, when it desires to say that a particular contract shall be void, knows how to say so, and, as I have said, it has not said so here.

In his judgment in the Divisional Court Lawrence J. said (1): "Miss Fantini is not claiming to enforce rights arising out of or under that contract. She is saying that the goods are her goods, that she was in possession of them, and that the seizure was wrongful because the goods were hers. She is right if she is not enforcing rights under or arising out of the contract. It is true that by way of historical narrative and to show the bona fides of the transaction she produced the assignment and the other facts which I have mentioned were proved, but she was not seeking to enforce rights arising under or out of the contract"; and Shearman J. said: "She was not enforcing a right 'under or arising out of any contract,' words which must mean springing immediately out of the contract, and at the particular moment the claimant's right did not arise out of the contract. Her right rested originally on the contract, but at the time in question it rested on her common law right of property." I agree with those passages. The appeal must be dismissed.

(1) [1918] 1 K. B. 152, 154.

BANKES L.J. I agree. Mr. David, for the execution creditor, contended, first, that the effect of ss. 1 and 7 of the Act of 1916 was to avoid the contract as between Miss Fantini and Rogers. I cannot take that view. Those sections are dealing with the necessity for registration and the imposition of a penalty in respect of any failure to register; they are silent as to the effect of non-registration upon any contract made by a person before registration. Sect. 2 of the Money-lenders Act, 1900, contains a provision that a money-lender shall be registered, and imposes a penalty for non-registration, but it also provides that he shall not enter into any agreement in the course of his business as a money-lender otherwise than in his registered name. If this Act had contained any analogous provision the contract with Rogers might be said to be void; but there is no such provision. Sect. 8 says that where a person who ought to be but is not registered enters into a contract, his rights under or arising out of it shall not be enforceable by action or other legal proceeding. In my opinion those words were not intended to cover, and do not cover, a case like this. Prima facie they mean that the rights under or arising out of the contract are not to be enforceable against the other party to the contract. The section is dealing with cases where there is a refusal to perform the contract or something of that kind. I do not say that the section may not apply to cases other than those arising between the immediate parties—that we have not had fully discussed—but in my opinion it does not apply where, as here, it is sought to avoid the contract in the interests of a person not a party to it. The contention for the execution creditor amounts to this, that where the section uses the words "the rights of that defaulter under or arising out of any contract" it means to say "the rights of that defaulter created by any contract." I cannot accept that contention. I agree with Shearman J. that in this case Miss Fantini was not claiming a right under or arising out of any contract, but was claiming a right which had been created by a past contract, and that at the material time her claim rested on her common law right of property.

SCRUTTON L.J. Miss Fantini carries on a dressmaker's business under the name of Laurette. She bought the goodwill and stock-in-trade of a similar business from one Rogers, paid for it, and went

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into possession. It is not suggested that that transaction was a sham. A creditor of Rogers then put in execution upon the goods which Miss Fantini had bought, and, as I understand the argument, it is said that inasmuch as Miss Fantini was not registered under the Registration of Business Names Act, 1916, she is not entitled to protect the goods against him or any one else. I think the answer to this argument made by the Divisional Court is right. That Court said that while the Act prevents a person in default from enforcing by action or other legal proceeding any rights under or arising out of the contract, Miss Fantini was not enforcing rights under or arising out of the contract and was entitled to claim the goods by virtue of her common law rights which arose independently of any contract. Mr. David questions this on the strength of certain observations of Parke B. in *Gadsden* v. *Barrow*. (1) Since the case of *Armory* v. *Delamirie* (2) it has been well established that mere possession is enough to entitle a person to sue in trover, and that he need not show the manner in which possession was obtained. In *Burton* v. *Hughes* (3) trover was brought for certain articles of furniture seized by the defendants under a commission of bankruptcy against one Cross. The plaintiff claimed the goods as being in his possession. In answer it was said that he obtained possession of them under a written agreement, and that as he failed to produce it he was not entitled to maintain the action. The Court held that it was immaterial that the plaintiff's possession arose under the written agreement because his possession was sufficient to support trover without ascertaining the nature of his interest. That case was decided on the authority of *Sutton* v. *Buck* (4), which is nearer the present case. There it was held that possession of a ship under a transfer, void for non-compliance with the Register Acts, was a sufficient title in trover against a stranger for parts of the ship which had been wrecked. The view taken in this case by the Divisional Court is in accordance with the doctrine of the common law. That is independent of what the statute means, bu I desire to say, although it is not necessary finally to decide the point, that in my view the application of s. 8 is limited to proceedings between the parties to the contract. It is

(1) 9 Ex. 514, 515.
(2) (1722) 1 Str. 505; 1 Sm. L. C., 12th ed., 396.
(3) (1824) 2 Bing. 173.
(4) (1810) 2 Taunt. 302.

quite true that the words are general, but one is always at liberty to limit general words by a consideration of the consequences that would follow if too wide a meaning were put upon them. If Mr. David's contention is right, a foreign butcher, carrying on business here under an English name, and not registered under this Act, might find people walking into his shop and taking his meat, and he would be unable to make them pay for it. Or, again, a foreign market gardener who had bought a piece of land of which he had been in possession for a number of years would, if trading under a different name and not registered under the Act, be unable, if people trespassed on his land, to protect himself, because, according to the argument, he would be enforcing a right under or arising out of the contract by which he purchased the land. Unless very strong words are used compelling us to accept that construction, I should be slow to believe that Parliament intended anything so startling. The language of the section seems to me to be amply satisfied by applying it only to proceedings between the parties to the contract, but, as I have said, it is sufficient to affirm the decision on the same ground as that taken by the Divisional Court, which is independent of the exact meaning of the words of the section.

Appeal dismissed.

Solicitor for execution creditor: *C. V. Whitgreave.*
Solicitors for claimant: *Merton & Steel.*

J. S. H.

1918
April 30;
May 15.

HENMAN *v.* BERLINER.

[1917 H. 1530.]

Landlord and Tenant—Lease—Covenants by Lessee to pay Outgoings and keep Premises in Repair—Collateral Agreement by Landlord to put Drains in Repair—Order by Sanitary Authority on Lessor to reconstruct Drains—Liability of Lessee.

The defendant agreed with the plaintiff that if the plaintiff would put the drains of the plaintiff's house into a sound and proper condition, he would take a lease of the house. A lease was subsequently executed by the defendant, which contained covenants by the defendant to pay all outgoings payable in respect of the premises during the tenancy, and to keep the premises in repair. The plaintiff did not either before or after the execution of the lease put the drains into a sound or proper condition, and by reason of her failure so to do a nuisance from defective drainage was caused on the premises during the currency of the lease, and the plaintiff incurred expense in complying with an order of the sanitary authority to abate the nuisance, under the Public Health (London) Act, 1891. The plaintiff sued the defendant to recover the sum expended by her:—

Held, that the defendant was not liable, on the grounds (1.) that the covenant to pay outgoings did not apply to a payment for work rendered necessary by the plaintiff's failure to repair the drains in accordance with the agreement; and (2.) that the covenant to keep the premises in repair did not apply to the drains unless and until they had first been put in repair by the plaintiff.

Payne v. *Haine* (1847) 16 M. & W. 541 distinguished.

ACTION tried by Sankey J. without a jury.

By an indenture dated June 21, 1909, the plaintiff, a married woman, demised to the defendant a piece of ground with the dwelling-house erected thereon, known as 24, Acol Road, West Hampstead, for a term of twenty-one years from June 24, 1909, at the yearly rent of 100*l*. By the indenture the defendant covenanted to "pay and discharge all rates, taxes, outgoings and assessments whatsoever payable in respect of the premises during the tenancy (landlord's property tax only excepted)," and to "repair substantially and at all times during the said term keep in good and substantial repair and condition all the said messuage and premises . . . . and the same in such good and substantial repair

and condition deliver up to the lessor at the expiration or sooner determination of the said term."

On March 2, 1917, an order was made under the Public Health (London) Act, 1891, requiring the plaintiff to put the premises in a sanitary condition and to abate a nuisance then existing on the premises in consequence of the defective condition of the drainage. The plaintiff incurred expense to the amount of 130*l.* 15*s.* in complying with the requirements of the order, and claimed in this action to recover that sum from the defendant under the covenants in the lease. The facts are fully stated in the judgment.

Maddocks, for the plaintiff.
Morton Smith, for the defendant.

Cur. adv. vult.

May 15. SANKEY J. read the following judgment:—In this case the plaintiff is the lessor of a house in West Hampstead, and the defendant is the lessee, under a lease dated June 21, 1909. In 1916 the drains of the house were out of order, and the local authority, acting under the Public Health (London) Act, 1891, served first a notice and secondly an order upon the plaintiff to execute repairs. The plaintiff complied with the order at an expense of 130*l.* 15*s.*, and seeks to recover this amount from the defendant either under a covenant in the lease whereby the defendant agreed to discharge all outgoings payable in respect of the premises, or, alternatively, under a covenant to keep the premises in good and substantial repair. The defendant denies that he is liable under either of these heads, and, alternatively, asks that the lease may be rectified in order to make it conform with the true agreement between the parties, under which he would not be liable to pay the sum claimed.

The facts are as follows: In the year 1909 the plaintiff and defendant began negotiating about a lease of the premises in question, but the defendant insisted, as a preliminary stipulation, that he would not take the house unless the drains were put in thoroughly proper condition. The parties could not agree upon this, and upon June 2 the defendant wrote to the plaintiff saying the matter was at an end. As a consequence the plaintiff made an offer to the defendant which is contained in a letter of June 4, 1909,

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written by the plaintiff's husband, and is as follows: "The trustees offer, first, they are still willing to carry out their first offer to let the house at 85*l.* per annum on lease and allow you 50*l.* towards such inside work sanitary and otherwise as you may desire to have done, you to pay whatever the costs may be above the allowance of 50*l.* The trustees will have roof made good and outside drainage put into proper condition so far as I may consider necessary, you doing any outside work which you may consider necessary. The second offer is a rental of 100*l.* on lease, the trustees putting the premises in reasonable tenantable repair inside and out. The interpretation of reasonable tenantable repair being that the sanitary fittings and decorations shall be suitable to such a class of house and that all structural repairs shall be done. But although I as an architect will see that the drainage is in a sound and proper condition the trustees will not be subject to the dictation of any sanitary authority, some of which I regret to say too frequently condemn what is perfectly safe and suitable in order to make work, but I can assure you I would no more think of permitting a tenant to occupy an unhealthy building than I would willingly occupy one myself." It will be observed that the offer contained two alternatives, and by a letter of June 7 the defendant accepted the second alternative.

I find that the agreement between the parties was: (1.) That the plaintiff would put the drains into sound and proper condition; (2) that the defendant would accept a lease of the house with the drains in such good condition; and (3.) that the defendant would not have executed the lease unless the plaintiff had agreed to repair the drains as aforesaid. In due course the plaintiff's solicitors sent the draft lease for approval to the defendant in a letter of June 9, in which they say: "As to the repairs to be done by our client, a separate letter should be given on completion of the lease." The defendant perused the lease, executed it, and went into possession of the house. The lease contained, as above mentioned, a covenant by the defendant to pay outgoings and to keep in repair, but contained no covenant by the plaintiff to put the drains in repair, although she had contracted to do so.

After the defendant had been in possession some time, and in 1916 diphtheria broke out in the house, the drains were examined by the local authority, who ordered them to be put into a proper

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condition. The drains were partly under the house and partly outside it, and it was admitted by the plaintiff that nothing had been done in 1909 to repair the drains under the house, but it was contended that the drains outside the house had been repaired in accordance with the plaintiff's contract. A good deal of evidence was given on this point, and I have, without hesitation, come to the conclusion that the plaintiff never performed her contract to put the drains in sound order and condition. She never did any repairs to them at all, and the repairs which the local authority ordered to be done in 1917 were the repairs which the plaintiff contracted to do, and ought to have done, when she let the house to the defendant. I am satisfied that if the plaintiff had done the repairs that she contracted to do no repairs would have been necessary in 1917, and that in effect the plaintiff is seeking to make the defendant pay for work which she herself had contracted to do. These being the facts, I turn to the law.

The plaintiff relied upon the well-known case of *Stockdale* v. *Ascherberg* (1), where it was held that a covenant to pay outgoings imposed upon a lessee the liability to pay for expenses incurred in obedience to the order of a local authority. In considering the meaning of the word " outgoings " it is necessary to remember that a covenant of this character must be assumed to relate only to matters which may be reasonably supposed to have been contemplated by the parties as being within the purview of the contract: see the case of *Foulger* v. *Arding* (2), where Romer L.J. says: " The present is not a case, such as was suggested during the argument, in which any one would say, looking at the nature of the contract between the parties, that the matter was not one which could have been within their contemplation, being altogether outside the scope and purview of that contract." It is not possible to say that the word " outgoings " must always, and as a matter of law, include charges of this character. Taking the whole contract here, namely, the stipulation by the plaintiff to repair and the covenant by the defendant to pay outgoings, I am of opinion that the outgoings which the defendant covenanted to pay were outgoings in connection with the drains as properly repaired by the plaintiff in accordance with her contract. If, for example, the plaintiff had put the drains

(1) [1904] 1 K. B. 447. (2) [1902] 1 K. B. 700, 711.

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into proper condition and they had subsequently gone wrong and the local authority had insisted upon them being repaired, the defendant would have been liable to pay the cost of the repairs because he had covenanted to pay outgoings in respect of the drains as agreed to be demised—that is to say, the drains as repaired and put into proper order and condition by the plaintiff. The covenant in this lease to pay "outgoings" does not compel the defendant to pay for work which the plaintiff herself contracted to do, and under the peculiar circumstances of the present case I am of opinion that the sum in question is not an "outgoing" within the meaning of the covenant.

The plaintiff then sought to rest her case upon the well-known decision in *Payne* v. *Haine* (1), which decided that a covenant to keep in repair imports a covenant to put in repair; but that case is distinguishable, in my view, for the reason given above—that is to say, one has to consider what the defendant covenanted to keep in repair. In the present case he covenanted to keep in repair the drain as put in order by the plaintiff. The work has now been done, and if in future the drain gets out of order, and the local authority insist upon its being repaired, the plaintiff will be able to recover the expenses under the covenant to pay "outgoings," but in the present action her claim fails.

Under these circumstances it is not necessary for me to consider the claim for rectification, but I think the lease does not really contain the true agreement between the parties, for it omits a covenant by the plaintiff to put the drain in repair. If that covenant were inserted the defendant would be in the same position as my present judgment leaves him in, for he would be entitled to claim, and I should certainly grant him, an indemnity against the plaintiff's demand which in effect he claims: see *Howe* v. *Botwood*. (2) In the result my judgment is for the defendant, with costs.

Judgment for defendant.

Solicitor for plaintiff: *T. C. Newman, for Sutthery & Wortley, Chelmsford.*

Solicitors for defendant: *Kimber Bull & Co.*

(1) 16 M. & W. 541.

(2) [1913] 2 K. B. 387.

F. O. R.

MONTEFIORE *v.* MENDAY MOTOR COMPONENTS COMPANY, LIMITED.

1918
May 2, 9, 15.

[1917 M. 685.]

Contract—Public Policy—Commission payable for obtaining Benefit from Government—Illegality not pleaded—Duty of Court.

It is contrary to public policy that a person should be hired for money or valuable consideration to use his position and influence to procure a benefit from the Government, and a contract for that purpose is therefore illegal and void.

Where it appears from the evidence during the hearing of a case that the contract sued on is contrary to public policy it is the duty of the judge to take the objection that the contract is illegal and void.

ACTION tried before Shearman J.

On July 5, 1917, a Mr. Keeling, the managing director of the defendant company, gave to the plaintiff a commission note in the following terms: "In consideration of your finding me the necessary capital, I am prepared to pay you 10 per cent. on the amount introduced either direct or indirect, and also to allot you forty shares in the Menday Motor Components Company, Limited."

The plaintiff, by his statement of claim and particulars, alleged that he had found capital, or alternatively introduced capital, for the defendant company by having arranged with the Treasury to provide the defendant company with the sum of 2000*l.*, and that that amount was paid to the defendants. The plaintiff alleged that he thereupon became entitled to be paid by the defendants a commission of 200*l.* and to have the shares allotted to him by the defendants. The defendants paid to the plaintiff three sums amounting in all to 100*l.*, and the plaintiff in this action claimed to recover 100*l.* as further commission due to him under the contract, and a declaration that he was entitled to have allotted to him forty shares in the defendant company.

The defendants, by their defence, denied that the plaintiff had performed any services in respect of which any claim could be made against them, or that any capital was found or introduced as the result of anything done or said by the plaintiff. The defendants also counterclaimed for the return of the 100*l.* paid by them to the

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plaintiff as money paid on a consideration which had failed or upon a fraudulent representation.

During the hearing of the case the point was raised by the judge whether the contract was not against public policy and therefore void.

The facts are fully set out in the judgment.

R. J. Willis, for the plaintiff.

Coumbe, for the defendants.

Cur. adv. vult.

May 15. SHEARMAN J. read the following judgment:—In this case the plaintiff is suing the defendant company for the balance of an amount alleged to be due to him on a commission note. The note is dated July 5, 1916, and reads as follows: "A. Montefiore, Esq. In consideration of your finding me the necessary capital I am prepared to pay you 10 per cent. on the amount introduced either direct or indirect, and also to allot you forty shares in the Menday Motor Components Company, Limited. W. E. Keeling, Managing Director." It is not disputed that Mr. Keeling had the authority of the company to enter into this contract, and the only material defence appearing on the pleadings is that the plaintiff did not find or introduce the sum of 2000*l.* which he alleges he found or introduced for the benefit of the defendants.

In the course of the hearing of the case I thought it right to call attention to the question whether there was not a further defence open to the defendants that the contract sued upon was void as being contrary to public policy. The defendants counterclaim for the return of 100*l.* paid by them under the contract and alleged a total failure of consideration.

I find the facts of the case to be as follows: The plaintiff, who formerly occupied a responsible position in connection with a well-known newspaper, is at present without any regular occupation except that of a financier, and has no regular place of business other than his own home. But he is a member of the Imperial Air Fleet Committee. This body consists of a number of noblemen and gentlemen whose ability, honesty, and patriotism are beyond all question. The fact that the plaintiff was a member of this body was

mentioned to me by his counsel in his opening statement as a recommendation of his position. The defendant company in the spring of 1916 was desirous of obtaining an advance of money to enable it to carry on the business of making component parts of aircraft. They advertised in a newspaper for an advance of money, and in consequence of the advertisement the plaintiff introduced himself to Mr. Keeling, the managing director of the defendant company. This was in May, 1916, and during the next few weeks the plaintiff interviewed certain Government advisers and officials with whom he says he had "been in touch on other matters." Although the plaintiff gave evidence that the balance-sheet of the defendant company was "extremely unsatisfactory," he had suggested to them that the Government should give an undertaking to fully employ this firm if they extended their works and plant. I do not doubt that, if such an undertaking had been given by the Government, it is not improbable that money might have been raised in the market upon the security of the Government contracts or undertaking. On June 26, however, the Director-General of Military Aeronautics, by letter, declined to give such an undertaking. Following this letter the plaintiff had an interview with Mr. Keeling, of which he gives the following account: "I told Mr. Keeling that a large number of important aircraft firms had approached me directly and indirectly for financial assistance; that I thought his best course was to lay the facts before the Air Board so that the development of the industry should not suffer for lack of capital. I told Mr. Keeling that I would include his firm in the list with a view to obtaining the capital, either through me with a Government guarantee, or, failing that, I might be able to obtain the financial assistance through the Air Board. When I told Mr. Keeling that he very strongly pressed me to urge the matter on his behalf."

Mr. Montefiore then settled the form of a letter which Mr. Keeling subsequently sent to an official of the Air Board, and Mr. Keeling gave to Mr. Montefiore the commission note now sued upon. Mr. Keeling's account of the transaction is substantially to the same effect, and he adds that Mr. Montefiore at the interview "talked airily of his acquaintance with a high official of the Air Board"; that he thought Mr. Montefiore had "put in a good word for him"; and that he thought Mr. Montefiore "was working to get an advance

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for me of a few thousands." I believe this statement the more readily because Mr. Montefiore, in giving evidence in the case, repeatedly alluded to certain high officials, and said that one of them had complimented him for his patriotism in certain schemes he appears to have propounded.

The Government in the autumn of 1916 advanced to the defendants 2500*l.*, taking, however, I am pleased to observe, rigorous precautions to see that the money was devoted wholly to the production of components of aircraft. The defendants paid the plaintiff 100*l.* under the contract, and Mr. Keeling stated that he did so because he thought all the while that the plaintiff was working in his interests and helping him to get the money which the defendants afterwards obtained from the Government upon their own direct negotiations. The plaintiff bases his claim upon the allegation that his introduction and services caused the advance of money to be given by the Government to the defendants.

I am satisfied, firstly, that the plaintiff never mentioned to any one connected with or advising the Government departments dealing with aircraft construction the fact that he had a pecuniary interest in the success of the defendants obtaining Government assistance. He appears upon his own admission to have obtained something like a dozen commission notes from different firms who were engaged in the manufacture of aircraft; secondly, that what was bargained for between the plaintiff and the defendants was the recommendation by the plaintiff of the merits of the defendants and the exercise of the influence of the plaintiff with servants of the Crown in order to induce an advance of public money to the defendants for the securing or the obtaining of Government contracts. The true consideration for the giving of the note was that the plaintiff should use his alleged position, and the value of his good word, in favour of the defendants in getting Government assistance in the form of money or contracts.

I do not propose to decide the question whether the plaintiff was the effective cause of the capital being found for the defendants by the Government. In my judgment the contract sued upon is illegal and void as contrary to public policy. It is well settled that "when it is apparent on the face of a contract that it is unlawful, it is the duty of the judge himself to take the objection, and that, too, whether the parties take or waive the objection. This was so

decided by Lord Mansfield in *Holman* v. *Johnson* (1) at law, and by Lord Eldon in *Evans* v. *Richardson* (2), and has been consistently acted on ever since": per Farwell L.J. in *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (3) The same principle applies to the illegality being disclosed in the evidence. As early as 1800 Lord Eldon applied it in *Norman* v. *Cole* (4), to which I shall have to refer later.

A contract may be against public policy either from the nature of the acts to be performed or from the nature of the consideration. In my judgment it is contrary to public policy that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the Government. This was expressly decided by Lord Eldon in *Norman* v. *Cole* (4) when he said: "I cannot suffer this cause to proceed. I am of opinion this action is not maintainable; where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money: the doing an act of that description should proceed from pure motives, not from pecuniary ones." So long ago as the reign of Edward VI. it was provided by the statute of 5 & 6 Edw. 6, c. 16, that it was illegal to bargain for any brokerage or money for the transference of an office, or any part of an office, concerning the receipt, controlment, or payment of any money or revenue of the Crown. And a later statute, 49 Geo. 3, c. 126, made it a misdemeanour to receive money for any office, place, or employment particularly specified in that Act. While I do not go to the length of holding that the defendants were bargaining with the plaintiff that they should receive an office under the Crown, I agree with the remarks of Coltman J. in the case of *Hopkins* v. *Prescott* (5) that where a person undertakes for money to use his influence with the Commissioners of Taxes to procure for another party the right to sell stamps, &c., if the contract were not void by statute, it would be void at common law as contrary to public policy. It is well settled that in judging this question one has to look at the tendency of the acts contemplated by the contract to see whether they tend to be injurious to the public

(1) (1775) 1 Cowp. 341.
(2) (1817) 3 Mer. 469.
(3) [1913] 3 K. B. 422, 424.
(4) (1800) 3 Esp. 253.
(5) (1847) 4 C. B. 578, 596.

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interest. In my judgment a contract of the kind has a most pernicious tendency. At a time when public money is being advanced to private firms for objects of national safety it would tend to corrupt the public service and to bring into existence a class of persons somewhat like those who in ancient times of corrupt politics were described as "carryers," men who undertook for money to get titles and honours for those who agreed to pay them for their influence: see the remarks of Lord St. Leonards in *Egerton* v. *Earl Brownlow*. (1)

It has been urged upon me in the course of the argument that a judge must act with great caution in declaring a contract void as against public policy. Burrough J. in *Richardson* v. *Mellish* (2), said that public policy "is a very unruly horse, and when once you get astride it you never know where it will carry you"; and Lord Bramwell in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) and Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines, Ld.* (4) repeat the warning. But, applying the words of Pollock C.B. in *Egerton* v. *Earl Brownlow* (5), "I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise."

In my judgment it is both in accordance with precedent and with public interest that I should declare this contract void as against public policy, with the result that both the action and the counterclaim are dismissed with costs.

Judgment for defendants.

Solicitors for plaintiff: *H. A. Graham & Wigley.*
Solicitors for defendants: *Swann, Hardman & Co.*

(1) (1853) 4 H. L. C. 1, 234.
(2) (1824) 2 Bing. 229, 252.
(3) [1892] A. C. 25, 45.
(4) [1902] A. C. 484, 491.
(5) 4 H. L. C. 149.

R. F. S.

REDEBIAKTIEBOLAGET ARGONAUT *v.* HANI.

1917
June 15.

Principal and Agent—Charterparty—Contract by Party "as charterers" —Claim by undisclosed Principal—Contradiction of written Contract.

A charterparty was expressed to be made between the plaintiffs the shipowners, and a limited company "as charterers." The defendant, claiming to be the undisclosed principal of the company, and purporting to act under an arbitration clause in the charterparty, instituted arbitration proceedings by giving the plaintiffs notice that he had appointed a person to act as his arbitrator. In an action by the plaintiffs for an injunction to restrain the defendant from proceeding with the arbitration on the ground that he was not a party to the charterparty:—

Held, that, having regard to the provisions of the charterparty as a whole and the duties thereby imposed upon the charterers, the words "as charterers" after the name of the company were a term of the contract, showing that the company had contracted as principals; and that the defendant was, therefore, not entitled to proceed with an arbitration under the charterparty.

ACTION in the commercial list tried by Rowlatt J. without a jury.

The plaintiffs claimed a declaration that the defendant had no interest or right as against the plaintiffs under a charterparty dated February 18, 1916, and an injunction to restrain the defendant from claiming to arbitrate under the charterparty as if the defendant were charterer or entitled to claim as charterer.

The charterparty, which was in a printed form containing thirty clauses, was expressed to be made by "Rederiaktiebolaget Argonaut owners" of the steamer *Frixos*, and "Messrs. Hansen Bros. Ltd. of Cardiff as charterers." Clause 27 was as follows: "Any dispute arising under this charter shall be referred to arbitration in London, one arbitrator to be nominated by the owners and another by the charterers, and in case such arbitrators shall not agree, then the decision of an umpire shall be final and binding upon both parties hereto. The arbitrators including the umpire shall be commercial men."

Hani, the defendant, contended that he was the undisclosed principal of Hansen Brothers, Limited, and that he was therefore entitled to institute arbitration proceedings in respect

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of certain disputes which, he alleged, had arisen under the charterparty.

R. A. Wright, for the plaintiffs. The defendant is not entitled to give evidence to prove that he was the undisclosed principal of Hansen Brothers, Limited, for to do so would be to contradict the terms of the charterparty, by which Hansen Brothers, Limited, are described as the charterers, that is, as principals: *Humble* v. *Hunter*. (1) The correctness of the decision in that case was doubted by Lord Russell of Killowen C.J. in *Killick & Co.* v. *Price & Co.* (2), but it was approved of by the Court of Appeal in *Formby Brothers* v. *Formby*. (3) The importance of the personality of a charterer is illustrated by *Fratelli Sorrentino* v. *Buerger*. (4) Throughout this charterparty it is Hansen Brothers, Limited, who alone assume the obligations of charterers.

A. Neilson, for the defendant. The word "charterers" in this charterparty is used merely as a word of description; that is manifest from the insertion of the word "as" before "charterers." This distinguishes the present case from *Humble* v. *Hunter* (1), where the decision proceeded upon the ground that the language of the charterparty showed that the party who was stated in the charterparty to be the owner of the vessel had held himself out in that capacity. A party may always be added to, though not discharged from, a contract by parol evidence: *Higgins* v. *Senior*. (5)

ROWLATT J. The plaintiffs claim an injunction to restrain further proceedings in an arbitration, which the defendant, purporting to act under the arbitration clause in a charterparty, has instituted by appointing an arbitrator. The charterparty was made between the plaintiffs, the owners of the steamship *Frixos*, and Hansen Brothers, Limited, "as charterers," and the arbitration clause provides that any dispute arising under the charterparty is to be referred to arbitration, "one arbitrator to be nominated by the owners and another by the charterers." The defendant claims to be entitled to assume the position of the charterers for all the

(1) (1848) 12 Q. B. 310.
(2) (1896) 12 Times L. R. 263.
(3) (1910) 102 L. T. 116.
(4) [1915] 3 K. B. 367.
(5) (1841) 8 M. & W. 834.

purposes of the charterparty on the ground that he was the undisclosed principal of Hansen Brothers, who made the charterparty. It is of course a well-known principle of law that an undisclosed principal may sue or be sued on a contract although the contract has been made in the name of another person who was the agent of the undisclosed principal. But this principle is subject to the limitation that an undisclosed principal cannot sue or be sued on the contract, if to do so would be to violate a term of the written contract. That is the principle underlying the decision in *Higgins* v. *Senior* (1), and in *Humble* v. *Hunter* (2), which was approved of by the Court of Appeal in *Formby Brothers* v. *Formby* (3) (in spite of some doubts which had been expressed by Lord Russell of Killowen C.J. in *Killick & Co.* v. *Price & Co.* (4)), it was held that the real owner of a ship could not sue on a charterparty in which another person had been described as the owner, although that other person had in fact made the charterparty as agent for the owner. It seems to me that in these cases it is always necessary to look at the document as a whole in order to ascertain whether such words as "as charterers" appearing after a person's name are merely words of description of the parties to the contract, in the same way as the words "of the first part" or "of the second part," or are used for the purpose of describing an essential part to be performed by the party in the transaction which the contract is dealing with.

It seems to me, having regard to the provisions of this particular charterparty, reading it as a whole, that the words "as charterers" are not merely the equivalent of such words as "of the one part" or "of the other part," but that they are words indicating that it is a term of the contract that the persons who are to fill the position of charterers and to have the rights of charterers are Hansen Brothers and no one else. If it was merely a question of receiving money or taking delivery of goods, the identity of the person named would be immaterial; but there are several clauses in this charterparty which show that here different considerations apply. For example, clause 7 provides that "the charterers" are "to give the owners not less than ten days' written notice at which port and on about

(1) 8 M. & W. 834.
(2) 12 Q. B. 310.
(3) 102 L. T. 116.
(4) 12 Times L. R. 263.

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which day the steamer will be redelivered." It is obvious that it was an essential feature of the business that the owners should know from whom they were to receive notice as to the place and date of redelivery. It cannot have been intended that the owners should be bound to accept the notice from any one who alleged that he could prove that he was the undisclosed principal of the charterers. Then clause 10 provides that "if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary and practicable, make a change in the appointments." The owners could not, in my opinion, be required to investigate complaints, not made by the persons designated as the charterers, but by some person, possibly unknown to the owners, who said he was the charterers' principal. Again, clause 11 says that "the charterers shall furnish the captain from time to time with all requisite instructions and sailing directions in writing," but it is necessary that the persons whose orders the captain is bound to obey should be definite persons. Clause 26 provides that if through unforeseen circumstances the steamer cannot be delivered by the cancelling date, the charterers, if required, shall within forty-eight hours after receiving notice declare whether they will cancel the charterparty or will take delivery of the steamer. The owners must know for certain to whom they are to send this notice, otherwise they might send the notice to a person who they had been told was the undisclosed principal of the charterers, and subsequently the named charterers might deny the right of that person to receive the notice. Lastly, there is the arbitration clause to which I have already referred, which might conceivably involve the owners in an arbitration conducted by a sole arbitrator appointed by the charterers. It is most important that the owners should know with whom they are dealing for that purpose. If it is desired to keep in the background the name of the person who really is the charterer, there is no reason why, if the owners consent, the charterparty should not be made by some person as agent for the charterer. But when the name of a person is inserted as charterer in a document containing clauses such as those I have referred to, it seems to me that the words "as charterer" are not mere words of description but are intended to be a term of the contract.

For these reasons the plaintiffs succeed in the action and are entitled to the declaration and injunction asked for.

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Judgment for plaintiffs.

Solicitors for plaintiffs: *Stokes & Stokes.*
Solicitors for defendant: *Pritchard & Sons.*

F. O. R.

COUNTY HOTEL AND WINE COMPANY, LIMITED *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

[1916 C. 2541.]

1918
March 20, 21, 22, 25; *April* 17.

Railway—Agreement—Refreshment Rooms—Option of renting—Assignability—Uncertainty—Ultra Vires.

The L. and C. Railway Company in 1853 leased some land adjacent to a certain railway station to H. for 999 years for the purpose of erecting an hotel thereon. The lease contained a clause that the tenant or occupier of the hotel should have the option of renting the refreshment rooms of the station at the rent and subject to the rules and regulations to be from time to time fixed by the committee for the management of the station. In 1860 H. granted a sub-lease of the hotel to B. for twenty-one years; and in the same year the railway company also granted a lease of the refreshment rooms to B. for twenty-one years. B. subsequently assigned to the plaintiff company all his interest under the two leases. In 1866 H. assigned to the plaintiff company the land and premises comprised in and demised by the lease of 1853 with all the rights, easements, privileges, and appurtenances to the premises belonging. The plaintiff company managed both the hotel and the refreshment rooms from 1866, and continued in occupation of the refreshment rooms after the expiration of the twenty-one years' lease granted to B. in 1860. In 1879 the defendant railway company succeeded by statute to the whole of the contracts, rights, powers, duties, and liabilities of the L. and C. Railway Company. In March, 1916, the defendant railway company by notice terminated the plaintiff company's occupation of the refreshment rooms. The plaintiff company thereupon in July, 1916, gave the defendant company notice of their desire to exercise the option contained in the lease of 1853, which notice the defendant company ignored. In October, 1916, the plaintiff company took an assignment from the personal representatives of H., who had died, of all the benefit, right, title, and interest (if any) remaining outstanding or otherwise vested in them in

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relation to the railway obligations. The plaintiff company brought an action claiming a declaration that the defendant railway company were under an obligation to put and keep the occupier of the plaintiffs' hotel at the station in occupation of the station refreshment rooms :—

Held—(1.) that the option clause was assignable ; that although it was not assigned by the assignment from H. to the plaintiff company in 1866, yet that there was a complete and effective assignment of the benefits of the clause from the personal representative of H. to the plaintiff company in October, 1916, and that the assignment was not champertous. (2.) That inasmuch as it was the business duty of the defendant railway company to provide food for passengers, and that as the defendant company would, if the option clause were valid, be permanently deprived of the use and occupation of the station refreshment rooms and be prevented from supplying food to passengers at the station and would thereby be unable to carry out efficiently their duties to the public, the option clause was ultra vires and void. (3.) That the option clause was also void for uncertainty.

ACTION tried before McCardie J. without a jury.

The following statement of facts is taken from the judgment :—

" The plaintiffs claim damages for the breach of a contract contained in a lease of August 1, 1853. I proceed to summarize the circumstances.

" Prior to the year 1853 the defendants' predecessors, the Lancaster and Carlisle Railway Company, gained statutory powers for the acquisition (inter alia) of land whereon to construct Carlisle Railway Station and the requisite appurtenances. The contemplated works were duly carried out. Adjacent to the actual railway station was a piece of land not required for the operations of the railway company.

" On August 1, 1853, the Lancaster and Carlisle Railway Company leased that land to one George Head, his executors and limited assigns, for the purpose of erecting an hotel thereon. The lease was for 999 years. The lessee covenanted to keep the hotel in a proper and efficient manner. The usual powers of re-entry for breach of covenant appear in the lease. The lessors covenanted to keep and maintain a covered passage from the hotel to the railway platform. Apparently refreshment rooms had then been erected at the station. The lease contained the following words : ' And the said company for themselves and their successors and assigns do

hereby covenant with the said George Head his executors administrators and limited assigns that the said company and their successors and assigns shall permit the tenant or occupier of the said hotel for the time being and his servants to have access to the platforms of the said station in the same manner and under the same rules and regulations and restrictions as is now permitted by the London and North Western Railway Company to the occupier of the Euston and Victoria Hotels in reference to the Euston Station platforms of the London and North Western Company and that the tenant or occupier of the said hotel shall have the option of renting the refreshment rooms of the said station at the rent and subject to the rules and regulations to be from time to time fixed by the committee for the management of the Carlisle Joint Station in preference to any other party, it being the intention and wish of the said parties hereto that the same person shall have the option of occupying the said hotel and refreshment rooms.' I infer that Head thereafter occupied the refreshment rooms of Carlisle Station pursuant to the said clause. There is no evidence on the point.

"In 1860 two documents were executed. The effect of the one document is that Head granted a sub-lease of the hotel to a Mr. Breach for a period of twenty-one years at a substantial rent. The effect of the other document is that the Lancaster and Carlisle Railway Company granted a lease to Breach of the said refreshment rooms for a period of twenty-one years at the rent thereby reserved. This lease contained a series of appropriate and detailed provisions for securing the proper maintenance and good conduct of the refreshment rooms. It also provided that the lessee should conduct the business of such rooms to the satisfaction of the lessors, and it enabled them to determine the lease if the rooms were not conducted to their satisfaction.

"In the year 1864 the plaintiff company was duly registered under the Companies Act, 1862 (25 & 26 Vict. c. 89), for purposes which are sufficiently indicated by its name. Thereafter two further documents were executed, namely, (*a*) an assignment by Breach to the plaintiffs of all his interest under the two documents of 1860, and (*b*) an assignment by Head to the plaintiffs of the lease dated August 1, 1853. This assignment is dated

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August 29, 1866. It recites the lease and refers to the several special provisions for the mutual benefit of the railway company and Head respecting the said hotel and the said refreshment rooms at Carlisle Station. The relevant words of assignment are these: 'All that piece of land comprised in and demised by the said indenture of lease of the first day of August 1853 . . . . and all and singular other the premises comprised in and demised by the said hereinbefore in part recited indenture of lease of the first day of August 1853 with all and every the rights easements privileges and appurtenances to the same premises or any part thereof belonging or in anywise incident or appertaining and all the estate right title interest possession property claim and demand whatsoever both at law and in equity of the said George Head . . . . to or respecting the said premises.' I have set out these words because they have occasioned legal argument.

"From 1866 onward the plaintiffs managed and conducted both the hotel and the refreshment rooms. Access from the hotel to the platform was gained by the passage referred to in the deed of August 1, 1853. After the expiration of the twenty-one years' lease granted to Breach by the Lancaster and Carlisle Railway Company in 1860 the occupation of the refreshment rooms was continued by the plaintiff company at a yearly rent and subject to such terms of the deed of 1860 as were applicable to such an occupation.

"In the year 1879 the defendants succeeded by statute to the whole of the contracts, rights, powers, duties, and liabilities of the Lancaster and Carlisle Railway Company. On April 2, 1891, an indenture was executed whereby the defendants and the Caledonian Railway Company demised to the plaintiffs a plot of land adjacent to the hotel for a period of 962 years. This indenture recited the deed of August 1, 1853 (called the principal indenture), and contained the following proviso: 'Provided always and it is hereby expressly declared and agreed that these presents are without prejudice to any of the covenants conditions and agreements contained in the principal indenture and that all the covenants conditions and agreements contained in the principal indenture shall remain and be in full force anything herein contained to the contrary notwithstanding.' I set out these words as a point arose upon them.

"A few years ago differences arose between the plaintiffs and defendants, and ultimately on March 24, 1916, the defendants served a six months' notice on the plaintiffs to determine their occupation of the refreshment rooms. On September 29, 1916, the plaintiffs gave up possession of such rooms. Meanwhile the plaintiffs on July 14, 1916, served a written notice on the defendants stating their desire to exercise the option contained in the indenture of 1853 and requesting the defendants to inform them of the terms proposed for a new tenancy. The defendants, however, ignored such notice. Hence the plaintiffs on July 27, 1916, issued a writ claiming relief identical with that asked for in the present action.

"On October 16, 1916, the plaintiffs, in order if necessary to strengthen their position, secured an express assignment from the representatives of the personal estate of Head (who had died in 1876) of 'all that the benefit right title and interest (if any) now remaining outstanding or otherwise vested of and in the railway obligations in them or any or either of them.' The assignment duly recited the indenture of August 1, 1853, and the option clause therein. Written notice of such assignment was duly given to the defendants. Thereupon the plaintiffs abandoned the first action and issued their writ in the present proceedings on November 2, 1916.

"The relief asked by the statement of claim is as follows: '(1.) A declaration that upon the true construction of the lease of 1853 . . . . the defendants are under an obligation to put and keep the occupier of the plaintiffs' hotel at the' Carlisle 'Station in occupation of the refreshment rooms of such station for the time being used by the defendants and of the covered passage upon the terms of paying therefor a fair market rent. (2.) To have such rent fixed under the direction of the Court. (3.) Damages for the breach of such obligation by the defendants.' "

Langdon, K.C., and *Eustace Hills*, for the plaintiffs.

Hon. Frank Russell, K.C., *Disturnal, K.C.*, *Underhill*, and *Barrington-Ward*, for the defendants.

The points raised in the arguments and the cases cited sufficiently appear from the judgment.

Cur. adv. vult.

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April 17. McCARDIE J. read the following judgment:—This action raises several questions of novelty and general importance. The facts are not now in dispute. The relevant documents are admitted. But the legal problems evoked four days of acute argument. [His Lordship then read the statement of facts set out above, and continued:]

Before dealing separately with the points at issue it is desirable to state that the defendants expressly disclaim any desire to challenge the validity of the lease of 1853 upon any ground, whether of ultra vires or otherwise. They contest the option clause only, and I am asked to decide the case on the assumption that the lease (apart from the option clause) is valid. I also state that the plaintiffs now disclaim any assertion to an interest (by virtue of the option clause) in the lands of the defendants. In spite of the statement of claim they do not ask for specific performance. They demand only a declaration of their right and damages. Hence I am not called on to decide any question with respect to the law of perpetuities. It is agreed by the defendants that if the plaintiffs are right in their contention, then the damages shall as a matter of convenience be assessed as if the defendants had finally broken their obligations under the option clause. I may add that in September, 1916, the defendants took the refreshment rooms into their own management and control. They have not let or sought to let them, or to grant any licence of supply to any third person.

I now consider separately the questions which arise for determination: (1.) Did the option clause run with the land so that it ipso facto passed to the plaintiffs by the assignment in 1866 of the lease of 1853? The answer to this question is No. For the option clause does not touch or concern the thing demised, and the covenant does not therefore run with the land: see *Thomas* v. *Hayward* (1) and *Dewar* v. *Goodman*. (2) If it had touched or concerned the thing demised it would have passed with the land: see *In re Adams and the Kensington Vestry*. (3)

(2.) Did the option clause possess the inherent quality of assignability? In my opinion the answer is Yes. The covenant is made with the lessee, his executors, administrators, and assigns. It

(1) (1869) L. R. 4 Ex. 311. (2) [1909] A. C. 72.
(3) (1884) 27 Ch. D. 394.

was not a mere covenant personal to Head. It contemplated future assignment. Sometimes the terms of an option may show that it is personal only: see, for example, *In re Cousins*. (1) But as a rule an option to purchase or to take a lease will be assignable: see, for example, *Buckland* v. *Papillon*. (2) The doctrine of assignability is strikingly illustrated by such cases as *Manchester Brewery Co.* v. *Coombs* (3) and *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900), *Ld.* (4)

(3.) As the option clause is in my view assignable, then the next question for consideration is this: Was the benefit of that clause assigned by the deed of August 29, 1866? In my opinion the answer is No. I have already set out the material words of the deed of 1866. I think that the word "premises" in that deed refers to the physical subject-matter of the lease, that is, the land and buildings. As stated in Sheppard's Touchstone, 7th ed., p. 74 (cited by Mr. Langdon), that the word "premises" may sometimes mean all the foreparts of the deed antecedent to the habendum, that is, the premissa or preceding parts of the deed; see also 2 Bl. Com., p. 298, and *Beacon Life and Fire Assurance Co.* v. *Gibb*. (5) Or it may mean the thing demised or granted by the deed. The meaning of the word must depend on the language actually employed in the deed and the relevant context. Upon the whole (though not without doubt) I come to the conclusion that in the deed of 1866 the word "premises" is employed as indicating the physical subject-matter of the demise. Hence I think that such deed did not pass the benefit of the option clause. Several useful authorities on the point are collected in Stroud's Judicial Dictionary, 2nd ed., tit. "Premises."

(4.) Did the deed of April 2, 1891, amount to a fresh grant by the defendants to the plaintiffs of the option rights? This point has caused me difficulty. The deed of 1891 is expressed to be supplemental to the deed of 1853, but it is made between the plaintiffs of the one part and the Caledonian Railway Company as well as the defendants of the other part. It grants a lease to the plaintiffs of a plot of land adjacent to the hotel. It makes no reference to the

(1) (1885) 30 Ch. D. 203.
(2) (1866) L. R. 1 Eq. 477; L. R. 2 Ch. 67.
(3) [1901] 2 Ch. 608.
(4) [1903] A. C. 414.
(5) (1862) 1 Moo. P. C. (N.S.) 73.

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refreshment rooms. In no way does it recognize the plaintiffs as occupants thereof or as entitled to rights with respect thereto. Upon the whole I am unable to come to the conclusion that the effect of the deed of 1891 is to constitute a binding recognition of the plaintiffs as the assignees of the option clause. It merely states that the deed of 1853 remains in full force notwithstanding anything contained in the deed of 1891. It does not, I think, validate any prior ineffective attempt to assign the option clause.

(5.) Now it is admitted by the defendants that, apart from the question of champerty, the deed of October 16, 1916, constitutes a complete and effective assignment of the benefits of the option clause contained in the deed of 1853. But the defendants contend that the assignment of 1916 is a mere transfer of a right to damages and therefore champertous and void. This raises a question of general importance as to the power to assign causes of action. Champerty in the original sense was the maintenance of an action in consideration of a promise to give to the maintainer a share in the proceeds thereof. It was a branch of the general law of maintenance. The doctrine of champerty was, however, extended to cover the purchase of mere rights of litigation even though no actual maintenance was contemplated. It has been said that the purchase of a mere right of litigation is void: see *Prosser* v. *Edmonds* (1) and *Hill* v. *Boyle*. (2) That doctrine arose in times when the common law was incapable of recognizing the assignability of choses in action: cf. Pollock on Contracts, 8th ed., pp. 351-352, and the learned note (F) at p. 747 thereof. But although the doctrine of assignability developed, the law of champerty long maintained its rigidity both at law and in equity. Bills of exchange became freely negotiable at law. Debts became assignable in equity, and their assignability at law (together with other choses in action) was finally recognized by s. 25, sub-s. 6, of the Judicature Act, 1873 (36 & 37 Vict. c. 66). Such being the state of things, it would seem strange indeed to hold that a debt could not be assigned after the debtor had repudiated the debt by refusing to pay. Can a debtor destroy the assignability of a debt by repudiating his obligation of payment? It would be equally strange if a bill of exchange could not be transferred after its

(1) (1835) 1 Y. & C. Ex. 481. (2) (1867) L. R. 4 Eq. 260.

dishonour ; and I may indeed point out that s. 36, sub-s. 5, of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), expressly assumes that a dishonoured bill may be transferred. Yet I find that in *Prosser* v. *Edmonds* (1) Lord Abinger C.B. says (when referring to the subject-matter of assignment in that case) : " What is this but the purchase of a mere right to recover ? It is a rule—not of our law alone, but of that of all countries, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." If such a doctrine had been severely applied, then disputed debts and dishonoured negotiable instruments would, I conceive, be stricken with unassignability ; see the rigour of the rule as stated in Bacon's Abridgment, 7th ed., vol. 1, p. 329. I can well understand that causes of action strictly founded on tort, for example, libel or assault, should not on grounds of public policy be assignable. So, too, there are contractual causes of action of a particular character, for example, breach of promise of marriage, which may not, for obvious reasons, be assignable. But much of the law of champerty is coloured by the mediæval notion that choses in action were not assignable because they amounted to sales of a right to litigate : see, for example, per Lord Abinger in *Prosser* v. *Edmonds*. (2) Time will not permit me to review the doctrine of champerty historically ; I need only refer to some of the more modern decisions. In *May* v. *Lane* (3) Lord Esher M.R. said (referring to the transaction in that case) : " An action could only have been brought to recover damages for breach of contract, and such a right of action is not assignable." In the same case Rigby L.J. said (4) : " A legal chose in action is something which is not in possession, but which must be sued for in order to recover possession of it. It does not include a right of action, such as, for instance, a right to recover damages for breach of a contract, or a legal right to recover damages arising out of an assault, for if the argument on

(1) 1 Y. & C. Ex. 497.
(2) Ibid. 499.
(3) (1894) 64 L. J. (Q.B.) 236, 237.
(4) Ibid. 238.

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behalf of the plaintiffs be correct, such a right would be assignable and this sub-section "—that is, s. 25, sub-s. 6—" of the Judicature Act would materially affect the law of champerty and maintenance." But I very respectfully think that the above dicta go too far and suggest too broad a proposition. To place damages for an assault upon the same footing as damages for breach of contract surely ignores the vast distinction which exists between the two. In *Torkington* v. *Magee* (1) Channell J., in delivering the judgment of the Divisional Court, referred to the above dicta, and apparently expressed the view " that when a breach of contract had occurred in respect of which the original party to the contract could sue for damages, he could not assign those damages so as to enable the assignee to sue." Again I venture to think that this dictum, in view of other decisions, goes too far. I can see no reason why damages for breach of contract should not in some cases be capable of assignment without infringement of the public interests. Take, for example, a case where the contract admittedly fixes the damages for breach at a liquidated sum and provides that it may be sued for as a debt. What reason of public policy should prevent the assignment of such sum if public policy permits the assignment of a disputed debt ? The whole law upon the matter requires broad juristic consideration and decision by an appellate tribunal in the light of modern circumstances. I desire to point out that in *Williams* v. *Protheroe* (2) the defendant agreed to sell (*a*) a freehold property, (*b*) arrears of rent due to the defendant from a tenant of such property against whom actions were then actually pending for the rent, and (*c*) the right to recover damages against the tenant for the breaches of his duty to repair. Express liberty was given to the plaintiff to use the defendant's name in legal proceedings. It was objected by the defendant, in a suit by the plaintiff to enforce the contract, that the claim disclosed a champertous and illegal agreement. But this objection was emphatically overruled by the Exchequer Chamber in holding that there was no champerty in an agreement which enabled the bona fide purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase. The juristic significance of this decision has perhaps not yet been fully

(1) [1902] 2 K. B. 427, 434. (2) (1829) 5 Bing. 309.

appreciated. In *Earle's Shipbuilding and Engineering Co.* v. *Atlantic Transport Co.* (1) Bigham J. declined to follow the dicta in *May* v. *Lane* (2), and held that the owner of an incomplete ship was entitled to assign not only the ship but also a claim for damages for breach of his contract with the builder, inasmuch as the latter thing was a chose in action within s. 25, sub-s. 6, of the Judicature Act, 1873. In *Ertel Bieber & Co.* v. *Rio Tinto Co.* (3) Lord Sumner treated a cause of action for damages for breach of contract as "a chose in action, a form of property." In *Defries* v. *Milne* (4) the Court of Appeal expressly held that an assignment of a cause of action for breach of contract already committed was, under the circumstances, valid whilst pointing out at the same time that a claim for tortious waste is not capable of assignment. The claim for damages was there assigned together with a leasehold interest. In considering the modern law of champerty, it is well to remember also the decisions, though they be only indirectly relevant, of *Guy* v. *Churchill* (5), *Fitzroy* v. *Cave* (6), *Dawson* v. *Great Northern and City Ry. Co.* (7) and *Glegg* v. *Bromley.* (8) I respectfully abstain from analysing the statement by Stirling L.J. in *Dawson* v. *Great Northern and City Ry. Co.* (9) that "an assignment of a mere right of litigation is bad . . . . ; but an assignment of property is valid, even although that property may be incapable of being recovered without litigation." It will be the function of an appellate tribunal rather than of a judge of first instance to effect such an analysis and to differentiate between the two things. In the present case I am of opinion that the assignment here of October 16, 1916, was in no way infected with champerty. I summarize my reasons as follows: (*a*) That the assignment is of a right of property, namely, the option clause. (*b*) That a defendant cannot destroy the assignability of a right of property, whether it be a contract or other form of property, by committing a breach of contract by repudiation prior to the assignment. (*c*) That the defendants in the present case had not actually repudiated their obligations (if

(1) (1899) 43 Sol. J. 691.
(2) 64 L. J. (Q.B.) 238.
(3) [1918] A. C. 260, 289.
(4) [1913] 1 Ch. 98.
(5) (1888) 40 Ch. D. 481.
(6) [1905] 2 K. B. 364.
(7) [1905] 1 K. B. 260.
(8) [1912] 3 K. B. 474.
(9) [1905] 1 K. B. 271.

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any) under the option clause ; they had merely ignored the plaintiffs' notice of July 14, 1916. (*d*) Even if the defendants had in fact repudiated their obligations, yet the plaintiffs clearly had not accepted such repudiation. This is obvious from the correspondence and from the relief claimed in the writ and statement of claim. (*e*) Even if the defendants had repudiated their obligations and the plaintiffs had accepted such repudiation, I am still of opinion that under the circumstances of the case the assignment was valid. For it was an assurance of rights or claims which, through inadvertence only, had not previously been effectively assigned, and I think that the position and status of the assignees was such as would call for a rejection of the plea of champerty in view of such decisions as *Williams* v. *Protheroe* (1), *Earle's Shipbuilding and Engineering Co.* v. *Atlantic Transport Co.* (2), and *Defries* v. *Milne.* (3) The assignment is as valid now, in my view, as if made by the deed of August 29, 1866.

(6.) The defendants next contended that the option clause was void for uncertainty. Is this a sound contention ? I deem it to be a true rule of law that a promise must be reasonably certain, and that if the parties have expressed their agreement in such ambiguous and imperfect terms as to make it impossible to ascertain any definite meaning, then the agreement is necessarily void. The Court cannot either by specific performance or the award of damages enforce a contract which it is unable to interpret : see e.g. per Lord Tenterden C.J. in *Coles* v. *Hulme* (4) and per the Court of Appeal in *In re Vince.* (5) In *The Hibernian* (6) Fletcher Moulton L.J. indicated that it might well be the duty of the Court to refuse to construe an unintelligible document, although he pointed out at the same time that a judge must not refuse to construe without grave cause. In *Ryan* v. *Thomas* (7) Warrington J. held that a clause in an agreement giving a " first option " was void for uncertainty. The question of uncertainty is dealt with instructively in Fry on Specific Performance. Decisions which appear to favour the present plaintiffs are cited in s. 380. Decisions which seem to

(1) 5 Bing. 309.
(2) 43 Sol. J. 691.
(3) [1913] 1 Ch. 98.
(4) (1828) 8 B. & C. 568, 573.
(5) [1892] 2 Q. B. 478.
(6) [1907] P. 277, 285.
(7) (1911) 55 Sol. J. 364.

favour the defendants are cited in s. 385; see also ss. 368-370. Swinfen Eady L.J. did not favour the plea of uncertainty in *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers* (1900). (1) In the present case it is worthy of note that counsel on both sides appeared to be unable after prolonged argument to afford me any clear view as to the true effect and operation of the clause, and the learned draftsman of the statement of claim appears to have felt a like difficulty. It was contended by the defendants that an agreement by A. to sell to B. at a price to be fixed by C. is necessarily void for uncertainty unless and until the price is actually fixed by C. But I do not assent to this view. The proposition is not supported by the passages cited to me from Fry on Specific Performance, 5th ed., ss. 356 and 357. It is directly opposed to *Smith* v. *Peters* (2) (per Jessel M.R.), and the weighty decision of the Court of Appeal in *Foster* v. *Wheeler*. (3) The latter case is also important as showing that a less measure of certainty may be required where the claim is for damages and not for specific performance. This point was also considered by the Court of Appeal in *Waring & Gillow, Ld.* v. *Thompson* (4) in discussing s. 380 of Fry on Specific Performance. But, apart from the last-mentioned contention of the defendants, is the option clause here too vague to be incapable of enforcement by the Court, whether by specific performance or damages? In considering this question I do not overlook the words of Maule J. in *Cockburn* v. *Alexander* (5) that "generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the defendant." Upon the whole I have come to the conclusion, though I confess with doubt, that the option clause in the present case is void for uncertainty. In spite of the ingenious arguments of Mr. Langdon, I am unable to place upon it a meaning of a reasonably clear and workable character. It is, in my view, too vague and obscure to enable the Court to enforce it. The following are my reasons:—I am unable to ascertain by whom the option is to be exercised. Apparently it cannot be exercised by the lessee or

(1) [1910] 1 Ch. 12.
(2) (1875) L. R. 20 Eq. 511.
(3) (1888) 38 Ch. D. 130.
(4) (1912) 29 Times L. R. 154.
(5) (1848) 6 C. B. 791, 814.

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assignee of the lease. But is the person to exercise it the tenant, or the occupier of the hotel as distinguished from the tenant? For it is to be observed that the clause refers to the tenant or occupier. The very word "occupier" (if the licensing laws be considered) lends itself to ambiguity. If the tenant should be a different person from the occupier and the two are opposed in view as to whether the option should be exercised or not, which of the two is to prevail? I am unable to ascertain the manner in which the option is to be exercised or the time or times at which it is to be exercised. Can it be exercised for intermittent periods? and can the person exercising it determine such periods at his own free will? I cannot determine for what period the rent is to be fixed. Could the committee raise or lower it at their will from month to month or week to week? If the rent is at the absolute discretion of the committee, then the option will obviously be worthless. Let me assume, too, for a moment that the person (whether tenant or occupier) exercises the option but is unable or refuses to pay the rent. What is to happen in such a case? The option, I conceive, would still exist (if the plaintiffs be correct in their claim), for I am not aware of any doctrine of repudiation which would enable the defendants to declare a part only of the deed of 1853 to be finally broken whilst the lease itself (with all its other clauses) still subsists. The learned draftsman of the statement of claim, I point out, acted on the view that the Court rather than the committee is the proper tribunal to fix the rent. I am unable to give any satisfactory meaning to the words "rules and regulations." Prima facie these words would refer only to ordinary station regulations. The existing regulations (dated 1913) afford no assistance; for the only regulation which is relevant is No. 9, which prohibits (in substance) the user of railway refreshment rooms by railway employees. If the words mean that the committee may fix at any time whatever rules and regulations they please, then again the option clause might be worthless, for they may regulate the refreshment rooms out of existence. I am unable to give any satisfactory meaning to the word "committee." Does it mean the committee existing in 1853? If so, then the committee which existed in 1853 ceased to exist at a later date. For in 1853 it was a mere non-statutory body composed of several directors of the

Lancaster and Carlisle Railway on the one hand and several directors of the Caledonian Railway on the other hand. But in 1861 a new statutory body with a wider area of jurisdiction was created by an Act passed in that year: see the Carlisle Citadel Station Act, 1861 (24 & 25 Vict. c. clxvi.), and the old body ceased to exist. The recitals of that Act are useful in their historical detail. If the option clause referred to the committee as existing in 1853, it will follow, I think, that on the cessation of such body the option clause ceased to be binding: cf. Fry on Specific Performance, 5th ed., ss. 356 to 358, and the principles there stated, although *Foster* v. *Wheeler* (1) may be contrasted therewith. I may refer also to Leake on Contracts, 3rd ed., pp. 556-557, and to *Milnes* v. *Gery* (2) and *Firth* v. *Midland Ry. Co.* (3) The option clause apparently assumed a continuance of the committee as constituted in 1853. I am unable to see how the option could be fairly carried out save upon the terms of a written instrument defining period, rent, and conditions. The lease to Breach in 1860 illustrates the necessary conditions. A reference to that lease will show the striking vagueness of the option clause. But who is to determine such period and conditions? I doubt if the power of the committee to fix "rules and regulations" extends to such matters. If I assume written conditions, that the occupier broke them, and that the railway company thereupon determined the agreement under a power contained in the document, would the option holder be at once at liberty to exercise his option afresh and claim a continuance of the occupation of the rooms? Is the occupant of the rooms free to sell refreshments or not as he pleases? May he provide what foods or liquors he pleases? May he charge what prices he pleases? I am in doubt as to whether such matters could be controlled by the committee. If they can fix prices at their will, then, again, the option may be worthless. I am in doubt as to whether "the refreshment rooms" referred to in the clause mean the refreshment rooms as they then existed, or whether they mean the refreshment rooms wherever they may be at any time in the future in any part of the station. The above points will sufficiently indicate my main reasons for thinking that the clause is void for

(1) 38 Ch. D. 132, 134. (2) (1807) 14 Ves. 400.
(3) (1875) L. R. 20 Eq. 100.

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uncertainty. I cannot yield it any reasonably clear meaning, nor should I know on what basis to assess damages.

There is one point of construction which calls for express mention. The defendants submitted that, whatever its meaning in other respects, the option clause was only applicable if and in so far as they (the defendants) desired to let their refreshment rooms to third persons, and that it had no application when they proposed to occupy and conduct the refreshment rooms themselves. But the plaintiffs contended that the option existed in their favour at all times and under all circumstances, and that it applied in September, 1916, when the defendants took over and themselves managed the refreshment rooms. Again this question causes me doubt. But, having regard to the last words of the clause, I form the view that (apart from the point of general uncertainty) the contention of the plaintiffs on this point is apparently correct.

(7.) I now consider the final head of the main contentions raised by the defendants. They submitted that upon any construction of the contract, and certainly upon the plaintiffs' construction thereof, the option clause was void as being ultra vires. This point is obviously one of grave general importance, not only to the parties here concerned, but to all railway companies and similar corporate bodies. I have felt it my duty on this (as on other points in the case) to examine many authorities beyond those cited to me by counsel. The plaintiffs claim (in substance) a continuous right for the period of 999 years from 1853 to occupy (if they so desire) the refreshment rooms at Carlisle Station and sell refreshments thereat. It follows that if the plaintiffs possess such a right the defendants may be wholly debarred at the plaintiffs' will from the beneficial user of such rooms for their own purposes of supply or otherwise. A statutory incorporated undertaking is restricted as regards its powers to the purposes of its creation and the terms of its parliamentary mandate: see *Colman* v. *Eastern Counties Ry. Co.* (1) and *Salomons* v. *Laing*. (2) Moreover, a corporation of a public nature may not so deal with its property as either to incapacitate itself from performing or from fettering itself in the full performance of its public duties: see *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham*

(1) (1846) 10 Beav. 1. (2) (1850) 12 Beav. 339.

Canal Navigations (1), and Brice on Ultra Vires, 3rd ed., at p. 111. Hence the question in each disputed case must be whether, in view of the statutory powers and duties of the corporate body, the proposed act or conduct will debar that body from an adequate and efficient discharge of their duties to the public: per Lord Chelmsford L.C. (2) and per Lord Westbury. (3) This is the basic question in each case, and a question which, in my humble view, may not have been fully considered in some of the decisions on the point at issue. The principle, indeed, is clear. But its application may occasion doubt. In my opinion the Court must consider in each case (*a*) the nature of the privilege granted by the corporation, (*b*) the effect (actual or possible) of the exercise of such privilege on the present or future performance of the corporate duties, (*c*) the length of time for which the privilege is granted, and (*d*) the power of determination or control retained by the corporate body. The doctrine of ultra vires has been of slow development. It exhibits fluctuations. The decisions cannot, I fear, be reconciled. There are, indeed, some cases in which the privilege granted by a corporation cannot be said to interfere in any way with the fulfilment of its duty. Thus a railway company can allow strangers to use for payment the weighing machines of the company: see *London and North Western Ry. Co.* v. *Price & Son.* (4) This is clearly sound, and indeed I may well cite the words of James L.J. in *Attorney-General* v. *Great Eastern Ry. Co.* (5) as follows: "Where is this notion of ultra vires to extend to? Is it ultra vires for a railway company to make a profit from the sale of meat and drink at its refreshment rooms?" The Lord Justice gives other illustrations: e.g. "Would it be ultra vires for one company to let another company have the use of part of its offices, warehouses, and ground?" These are words of robust good sense if the nature of the illustration given be considered with the limitations indicated in *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigations* (1), already cited. So, too, it has been held that a railway company bound to supply boats for a ferry may employ such boats when not wanted for the ferry on excursions to places not mentioned in its Acts: see *Forrest*

(1) (1866) L. R. 1 H. L. 254.
(2) Ibid. 268.
(3) Ibid. 279.
(4) (1883) 11 Q. B. D. 485.
(5) (1879) 11 Ch. D. 449, 480, 481.

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v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1) For though the doctrine of ultra vires, as explained in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (2) is to be maintained, it must be applied reasonably: see *Attorney-General* v. *Great Eastern Ry. Co.* (3) The Courts, indeed, have gone far, and perhaps too far, in relaxation of the doctrine. For in *Grand Junction Canal Co.* v. *Petty* (4) the Court of Appeal, in following *Rex* v. *Inhabitants of Leake* (5), held that the canal company could dedicate to the public a footway along the towing-path itself. I most respectfully confess that I find it difficult to understand this decision, for that which is once a highway is always a highway, and if a large increase of the contiguous population took place it might well be that a constant stream of passengers would pass along the towing-path. Those who appreciate canal management can well foresee the resultant interference with canal traffic. In my view the case must be taken as resting on special facts, and in particular on the circumstance that no suggestion was made at the trial before Pollock B. and a jury that the dedication was inconsistent with the present or future duties of the canal company. I think also that *In re Gonty and Manchester, Sheffield and Lincolnshire Ry. Co.* (6) and *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers* (1900), *Ld.* (7) must also be taken to have rested on special facts. In *Arnott* v. *Whitby Urban Council* (8) Swinfen Eady J. was able to hold that a dedication of a highway could be made by the defendants in that case subject to their statutory powers of alteration and improvement.

With the above decisions must be compared the important cases of *Mulliner* v. *Midland Ry. Co.* (9) and *Great Western Ry. Co.* v. *Solihull Rural Council* (10), in each of which cases it was held that the dedication of a right of way was ultra vires on the ground that the user of the way might interfere with the purposes or objects of the railway company: see, too, *Taff Vale Ry. Co.* v. *Pontypridd Urban Council* (11), per Buckley J. The true principle

(1) (1861) 30 Beav. 40.
(2) (1875) L. R. 7 H. L. 653.
(3) (1880) 5 App. Cas. 473.
(4) (1888) 21 Q. B. D. 273.
(5) (1833) 5 B. & Ad. 469.
(6) [1896] 2 Q. B. 439.
(7) [1910] 1 Ch. 12.
(8) (1909) 73 J. P. 369.
(9) (1879) 11 Ch. D. 611.
(10) (1902) 86 L. T. 852.
(11) (1905) 69 J. P. 351.

was, I conceive, well applied in these cases, and so too in the decision (upon special facts) by Joyce J. in *Great Central Ry. Co.* v. *Balby-with-Hexthorpe Urban Council.* (1) The case of *Foster* v. *London, Chatham, and Dover Ry. Co.* (2), where the letting of the interior of railway arches for shops was held to be intra vires, may properly rest on the fact that the tenancies were for short terms only, and that the railway company could resume possession when they deemed it necessary for railway purposes to do so. For it seems clear that a railway company cannot deprive itself of its powers to use its acquired land for its statutory purposes: see *In re South Eastern Ry. Co. and Wiffin's Contract* (3), per Neville J.

Before stating the final considerations on the point, and my conclusion upon them, I must, however, refer to two cases which have given me much consideration. The first is *Rigby* v. *Great Western Ry. Co.* (4) There the defendants granted the plaintiff a lease for ninety-nine years of a plot of land adjacent to Swindon Railway Station for the purposes of a refreshment-room, and the defendants also covenanted (in substance) to do all they could by the stopping of trains for appropriate periods to increase the trade of the plaintiff at such refreshment-rooms. An injunction was granted by Wigram V.-C. to restrain the railway company from breaches of the agreement—which was assumed to be valid. If this decision be correct, it would appear to support the present plaintiffs' case. For the obligations of the Great Western Railway Company there were of a stringent character, and such as might gravely interfere either then or in the future with the service of express trains. It is to be expressly noted, however, that no question of ultra vires was raised by counsel in that case, and indeed in 1846 the doctrine of ultra vires was still in its birth. The second case is *Holmes* v. *Eastern Counties Ry. Co.* (5) This case was not cited before me in argument. There the defendants granted the plaintiffs the sole and exclusive licence (for a period of ten years) of selling books and other publications at such of the defendants' stations as the lessees should think fit and of using the bookstalls thereat respectively. This case is one of interest and importance inasmuch

(1) [1912] 2 Ch. 110.
(2) [1895] 1 Q. B. 711.
(3) [1907] 2 Ch. 366.
(4) (1846) 15 L. J. (Ch.) 266
(5) (1857) 3 K. & J. 675.

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as several of the points in the present case there arose for discussion. The agreement was treated as valid by Sir William Page Wood V.-C. and an injunction was granted to restrain the defendants from breaches of agreement. But here again the question of ultra vires was not raised, and the decision was given at a time when the doctrine was not fully developed.

All the cases I have cited are but illustrations of the application of the ultra vires rule, and they indicate the uncertainty of its operation. Each decision should be tested by the observations of Lord Chelmsford and Lord Westbury in the *Staffordshire and Worcestershire Canal Navigation Case.* (1) The cases in which it was held that a railway company has validly dedicated a right of way must, I think, rest upon the footing that such dedication did not and could not interfere with the present or future efficient working of the railway. If such a dedication may injuriously affect the carrying on of a railway system it would, I conceive, be void.

In the present case the option clause is asserted by the plaintiffs to give them a right for nearly one thousand years, not to a mere right of way, but to the actual occupation of all the refreshment rooms at Carlisle Station. At the present time those rooms, which are spacious, actually abut upon a main platform. Carlisle is the largest exchange station in the United Kingdom. No less than seven railway companies use the station. It is estimated that between 300,000 and 400,000 passengers per annum require the use of the refreshment rooms. If the plaintiffs are right, they possess (in substance) an absolute monopoly of supply at the refreshment rooms for nearly ten centuries. The railway company is stricken with impotence in such respect. The circumstances of modern travel require, I think, the provision of food for travellers. It may be that the provision of refreshment rooms cannot be ordered as a "facility" under s. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31): see *South Eastern Ry. Co.* v. *Railway Commissioners* (2), although I may point out that it has been held that lavatory accommodation and cloak-rooms may be ordered as facilities under that Act: see *Metropolitan Water Board* v. *London, Brighton and South Coast Ry. Co.* (3)

(1) L. R. 1 H. L. 268, 279. (2) (1881) 6 Q. B. D. 586, 595, 604.
(3) [1910] 2 K. B. 890.

and *Singer Manufacturing Co.* v. *London and South Western Ry. Co.* (1) But, apart from the Act of 1854, I do not doubt that the business duty of a railway company is to provide food for passengers as an obvious convenience, and indeed a necessity, of travel. I cannot think that it is intra vires a railway company permanently to deprive themselves of the use and the occupation of their own refreshment rooms and to inflict upon themselves (in substance) a lasting inability to supply food to passengers at Carlisle. To hold it intra vires would be injuriously and gravely to fetter their obligation to carry out efficiently and conveniently their duties to the public. I must therefore hold that the option clause here is ultra vires.

I desire to add that in my view the covenants in *Rigby* v. *Great Western Ry. Co.* (2), already cited, should have been held ultra vires if the point had there been taken and argued. The case of *Holmes* v. *Eastern Counties Ry. Co.* (3), which I have cited, may perhaps be supported in view of the special facts in that case and the extremely limited space required for the bookstalls in question. Newspapers, moreover, are not so vital as food to the convenience of travellers. But the period of ten years in that case may require serious consideration when contrasted with the short tenancies existing in *Foster* v. *London, Chatham, and Dover Ry. Co.* (4) I have thus dealt with the points which have called for determination.

I regret the length of this judgment, but I deemed it best to refer to the relevant authorities, not only for my own aid, but for the assistance of any higher tribunal which may consider the case. I beg to express my great obligation to counsel on both sides for their able assistance.

Judgment for defendants.

Solicitors for plaintiffs: *James & James, for Clutterbuck, Trevenen & Steele, Carlisle.*

Solicitor for defendants: *M. C. Tait.*

(1) [1894] 1 Q. B. 833.
(2) 15 L. J. (Ch.) 266.
(3) 3 K. & J. 675.
(4) [1895] 1 Q. B. 711.

R. F. S.

C. A.
1916
March 27, 29, 31; *April* 18.

[IN THE COURT OF APPEAL.]

CONSERVATORS OF THE THAMES *v.* KENT.

[1913 T. 602.]

River—Towpath—Ownership by adjoining Landowner—Public and Private Rights of Way over—Rule of usque ad medium filum aquae—Thames Conservancy—Validity of By-laws—Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxxvii.*), *s.* 191—*Thames Conservancy By-Laws*, 1898, *No.* 57—*Highway Dedication.*

Between Hampton Ferry and Molesey Lock the course of the river Thames is nearly east and west. On the south bank is the towpath, which, for the purpose of illustration, is divided into five parts—namely, A west to E, E west to D, D west to F, F west to B, and B west to C. There was admittedly a public highway for foot passengers only, but for all purposes, from A to B, and a public right of way over the same length for towing purposes with horses and other draught animals. The plaintiffs (the Thames Conservators) had statutory duties as to navigation and keeping the towpath in repair, whether they owned the soil of it or not, and also had a statutory power to make by-laws "for the government, good order, and regulation of persons . . . . using the towpaths," or for preventing disorderly conduct or the use of bad language to the annoyance of persons using the banks or towpaths of the Thames. The strip of towpath A to E was owned in fee simple by the plaintiffs. The strip E to D was owned in fee simple by the defendants, as also was the land contiguous to and on the south of that strip. The land contiguous to and on the south of the strip D to F had been conveyed by the owners in fee of both the land and the strip to the predecessors in title of the defendants, but the conveyance described the land as bounded on the north by the towpath and as coloured red on an annexed plan, the part coloured red not including the towpath. The strip of towpath F to B belonged to the plaintiffs in fee simple. The soil of the rest of the towpath, B to C, was vested in persons who were not parties to the action:—

Held—(1.) that the rule usque ad medium filum aquae applied so as to enable the Court to presume that the whole width of the strip of towpath D to F passed by the conveyance of the land lying to the south of it, and that the fact that in the same conveyance, where other land was conveyed, the strip of towpath to the north of it was expressly conveyed was not sufficient to rebut the presumption; (2.) that as to the portion of towpath vested in them in fee simple the defendants had the ordinary rights of user attached to the ownership of land, subject to the public footway and the exercise of the plaintiffs' rights in respect of

navigation; (3.) that, although the plaintiffs had the statutory power to make by-laws for the purposes aforesaid, a by-law that no person should ride or drive a horse on the towpath except when towing a vessel, or drive any cart, wagon, or other vehicle, over or upon any part of the towing-path, unless there was a public right of way for such cart, wagon, or vehicle, was ultra vires so far as it prohibited, on parts of the towing-path not vested in the plaintiffs, the acts referred to, where the doing of them did not necessarily damage or injure the towpath or interfere with the free navigation of the river; and (4.) that the plaintiffs, being a body holding land under statutory duties, could not make dedication of any portion of the towpath (even if vested in them) as a public highway, which was inconsistent with the proper performance of those duties.

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THE plaintiffs were, by virtue of the Thames Conservancy Act, 1894, and other statutes, enjoined and empowered to preserve, maintain, and control the navigation of the river Thames and the lands and works belonging thereto or connected therewith. The material enactments and by-laws made thereunder are referred to in the judgment of Scrutton J.

By the Act of 1894 the plaintiffs were empowered and directed to make, maintain, and repair the towing-paths of the river, and prevent and abate obstructions thereon or any injury or damage thereto, and the public were given liberty to use the towing-paths, with or without horses, for the purpose of towing vessels along the river.

The defendants, Charles W. Kent and Francis J. Kent, were the trustees of the will of F. J. Kent, and they alleged that as such trustees they were the freeholders of land adjoining the towing-path on the southern (Surrey) side of the Thames, between Molesey Lock and Hampton Ferry, and the owners of the soil of the towing-path (which ran between their lands and the river), and they also claimed and asserted a right of passage for themselves, their servants and agents, and other persons authorized by them, over and along the towing-path for the whole distance between the lock and the ferry, with or without horses (and whether or no for the purpose of towing), and with carts, carriages, and other vehicles. The same defendants further claimed and asserted a similar right of passage for themselves and all other persons, as members of the public, over and along the whole length of the towpath between the lock and the ferry; and they threatened and intended to exercise the said alleged rights and had already attempted to exercise them by causing carts laden with

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coke and drawn by horses to be driven over the towing-path, and in other ways. The above-mentioned facts (alleged by the plaintiffs in their statement of claim) were, subject as below stated, admitted by the defendants Kent.

The plaintiffs, in their statement of claim, further alleged that the same defendants' user of the towing-path (except for towing purposes) was calculated to interfere with the free, proper, and convenient use of the towing-path for the purpose of the navigation of the river, and to cause obstruction thereon and injury thereto; and they did not admit the same defendants' ownership either of the land or the soil of the towing-path, or that the defendants had a private right of way, or that there was even a public right of way, except on foot, or with horses for the purpose of towing.

The plaintiffs brought this action against the defendants Kent and the Attorney-General claiming (1.), as against the defendants Kent, an injunction restraining them, their servants or agents or persons claiming under them, from going on or passing along the towing-path between the lock and the ferry with horses (except for the purpose of towing), carts, carriages, motors, bicycles, tricycles, or any other vehicles, and from using the towing-path at any point between the lock and the ferry so as to damage the same or prevent or interfere with the free, proper, and convenient use of the towing-path for the purpose of the navigation; (2.) against the Attorney-General, as representing the public, a declaration that the public were not entitled to go or pass along the towing-path, except on foot, or with horses for the purpose of towing; and (3.) against all the defendants, a declaration as to the plaintiffs' rights in respect of the towing-path, and as to the plaintiffs' power of restricting, regulating, and controlling the use of the towing-path by the defendants Kent and persons claiming under them, and by the public.

The defendants Kent, by their statement of defence, stated (2.) that by a conveyance dated December 11, 1850, and made between J. Morrison and T. Todd of the first part, Joseph Todd of the second part, F. J. Kent the elder of the third part, and F. J. Kent the younger of the fourth part, certain hereditaments, part of which was a piece of land containing 11 acres 1 rood and 31 perches (below called "lot 20," and which is marked as being coloured pink and yellow in the plan annexed to this report), bounded on the south by

the high road from Hampton Court Bridge and Molesey Lock to Walton "and on the north as shown in the plan drawn on the said conveyance subject to and including the towing-path along the river Thames," were conveyed unto and to the use of F. J. Kent the younger, his heirs and assigns, in trust for F. J. Kent the elder, his heirs and assigns (1) ; (3.) that under this conveyance the defendants Kent, as trustees of the will of F. J. Kent the elder, were entitled in fee simple to the soil of the towing-path along the northern part of lot 20, subject to a public right of way thereover and to the statutory rights of the plaintiffs ; (4.) that by the same conveyance another piece of land (thereinafter called "lot 21," and which is marked as being coloured green in the plan annexed to this report) to the west of and adjoining lot 20, and having a frontage, as shown in the said plan, towards the river, was also conveyed and now belonged to the defendants Kent in fee simple ; (5.) that the soil of a strip of land thrown into the towing-path and measuring 492 feet eastward from the west end of lot 21 (which is marked as being coloured brown in the plan annexed to this report) was conveyed to the Corporation of London in 1831, and was not claimed by the defendants, but that they claimed under the conveyance of 1850, and were entitled in fee simple to, the soil of the rest of the towing-path along the northern part of lot 21 ; (6.) that they claimed also, and were entitled in fee simple to, a private right of way for all purposes over such parts of the towing-path from the said high road to the west end of lot 21 as did not belong to them in fee simple ; and (7.) that there was a public right of way for all purposes along the whole towing-path from the said high road (namely from point A on the plan) to Hampton Ferry. And the defendants Kent counterclaimed for declarations that they were entitled as stated in paragraphs 3, 5, and 6 of their defence, subject to the said public right of way and to the statutory rights of the plaintiffs.

The Attorney-General by his defence claimed all such public rights of passage over and along the towpath as might appear to exist with respect thereto, and submitted the same to the judgment of the Court, which he prayed to take care of the rights and interests of the public in the premises.

(1) This conveyance is more particularly described later on.

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In their particulars of defence the defendants Kent claimed, under paragraph 3 thereof, to be entitled in fee simple to the land coloured pink, including the part of the towing-path coloured pink; and they claimed the fee simple of such part of the towing-path as lay between lot 21 (the green land) and the river, except the part of the towing-path coloured brown (being the part between F and B on the plan). And, as to paragraph 6 of their defence, the defendants said that ever since the conveyance of 1850 they had exercised, and they claimed to be entitled in fee simple to, a private right of way along the towing-path so far as it lay between A and B on the plan, such right, so far as the towing-path was not vested in them in fee simple, being claimed as appurtenant to lot 21 (the green land) and to such part of lot 20 (pink and yellow) as belonged to them in fee simple.

The public right of way was claimed along the towing-path from A, near Molesey Lock, westward right away to the ferry marked C on the plan, on the ground that it had been used by the public from time immemorial for the purposes of going and coming to and from the public road at A, to and from the ferry, for the purposes of the ferry and for other purposes.

In the annexed plan the river Thames is shown to the extreme north, and the narrow strip next to it on the south (in parts not described as coloured, in part described as coloured brown and in the rest as coloured pink), and running from A westward to C, represents the whole of such part of the towing-path as is material to this report. As shown in the particulars of defence of the defendants Kent, lot 20 was the land marked as being coloured in the plan as to part pink and as to the rest yellow, and lot 21 was the land marked as being coloured green, which included the occupation or private road running south from the towpath near the point marked D.

The part of the towing-path coloured brown was the land conveyed to the Corporation of London, as stated in paragraph 5 of the defence, and this brown land was vested in the plaintiffs in fee simple.

The uncoloured strip of towpath between A and E was also vested in the plaintiffs in fee simple, and the uncoloured portion of towpath between B and C was vested in persons (other than the Conservators)

who were not parties to the present proceedings. The titles to the different strips of towing-path, running west from A to C, were as follows :—

Uncoloured strip from A to E. This was conveyed to the Conservators in fee simple by two deeds of June 30, 1820, and September 5, 1821.

Pink strip from E to just east of D. This belonged to the defendants Kent in fee simple, the towing-path here being expressly included in a conveyance of 1850 to their predecessor in title.

Uncoloured strip from just east of D to the east end of brown. This belonged, as the Court of Appeal held (reversing Avory J. on this point), to the defendants Kent in fee simple, although the adjoining land was described (in a deed of conveyance of 1850 to their predecessor in title) by measurements which did not include the towing-path, which was itself stated to be one of the boundaries of the land expressly conveyed.

Brown strip from west of last strip to B. This belonged to the Conservators in fee simple, having been conveyed in 1831 to the Corporation of the city of London, the predecessors in title of the Conservators.

Uncoloured strip between B and C. The soil of this was not vested either in the Conservators or the defendants Kent, and the owners of it were not parties to the action.

The action was tried by Avory J. in December, 1914, and on March 12, 1915, he delivered judgment in which he (1.) declared that the public were not entitled to go on or pass along the towpath between A and C " except on foot for all purposes, whether of profit or pleasure, or with horses for the purpose of towing " ; (2.) declared that the defendants Kent were entitled (subject to the statutory rights and duties of the plaintiffs, and subordinate to the use of the towing-path as a towing-path) to a private right of way, for all purposes, over such part of the towing-path as lay between A and D, such right, so far as it related to the part of the path coloured pink, being in fee simple, and, so far as it related to the uncoloured path near A, being appurtenant to the land coloured pink belonging to the defendants Kent in fee simple ; (3.) granted an injunction restraining the defendants Kent, their servants and agents, or persons claiming under them, from going on or passing along so

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much of the towing-path as lay between D and C, or any part thereof, with horses (except for the purpose of towing), carts, carriages, motors of any kind or description, bicycles, tricycles, or any other vehicles whatsoever; (4.) granted an injunction perpetually restraining the defendants Kent, their servants or agents, or persons claiming under them, from using so much of the towing-path as lay between A and C, or any part thereof, in such a manner as to damage the towing-path, or prevent or interfere with the free, proper, and convenient use of the towing-path for the purpose of navigation.

The defendants Kent appealed from the declaration above marked (1.); and from the injunction above marked (3.).

The plaintiffs gave a cross-notice claiming the reversal of the declaration marked (2.) so far as it applied to (*a*) the uncoloured portion of the towing-path from A up to the commencement of the part coloured pink, and (*b*) the uncoloured portion of the towing-path between the western end of the portion of it coloured pink and the point D, and that in lieu thereof there should, in respect of those portions, be an injunction restraining the defendants Kent, their servants and agents, or persons claiming under them, from going on or passing along the said portions of the towing-path with horses (except for the purpose of towing), carts, carriages, &c.

Macmorran, K.C., and *G. B. Rashleigh*, for the appellants, the defendants Kent.

McCall, K.C., and *C. B. Marriott*, for the plaintiffs.

G. A. H. Branson, for the Attorney-General.

[The arguments, which are sufficiently noticed in the judgments, took place on March 27, 29, and 31, 1916.]

Cur. adv. vult.

1916. April 18. WARRINGTON L.J. The Lord Chief Justice has asked me to say that he has read my judgment and that of Scrutton J., and that he agrees with our conclusions and with the form of order which I have drawn up with his assent and that of Scrutton J.

The plaintiffs are the Conservators of the river Thames; the defendants are two gentlemen named Kent (the owners of certain

riverside lands in the neighbourhood of Molesey in Surrey) and the Attorney-General (representing the public).

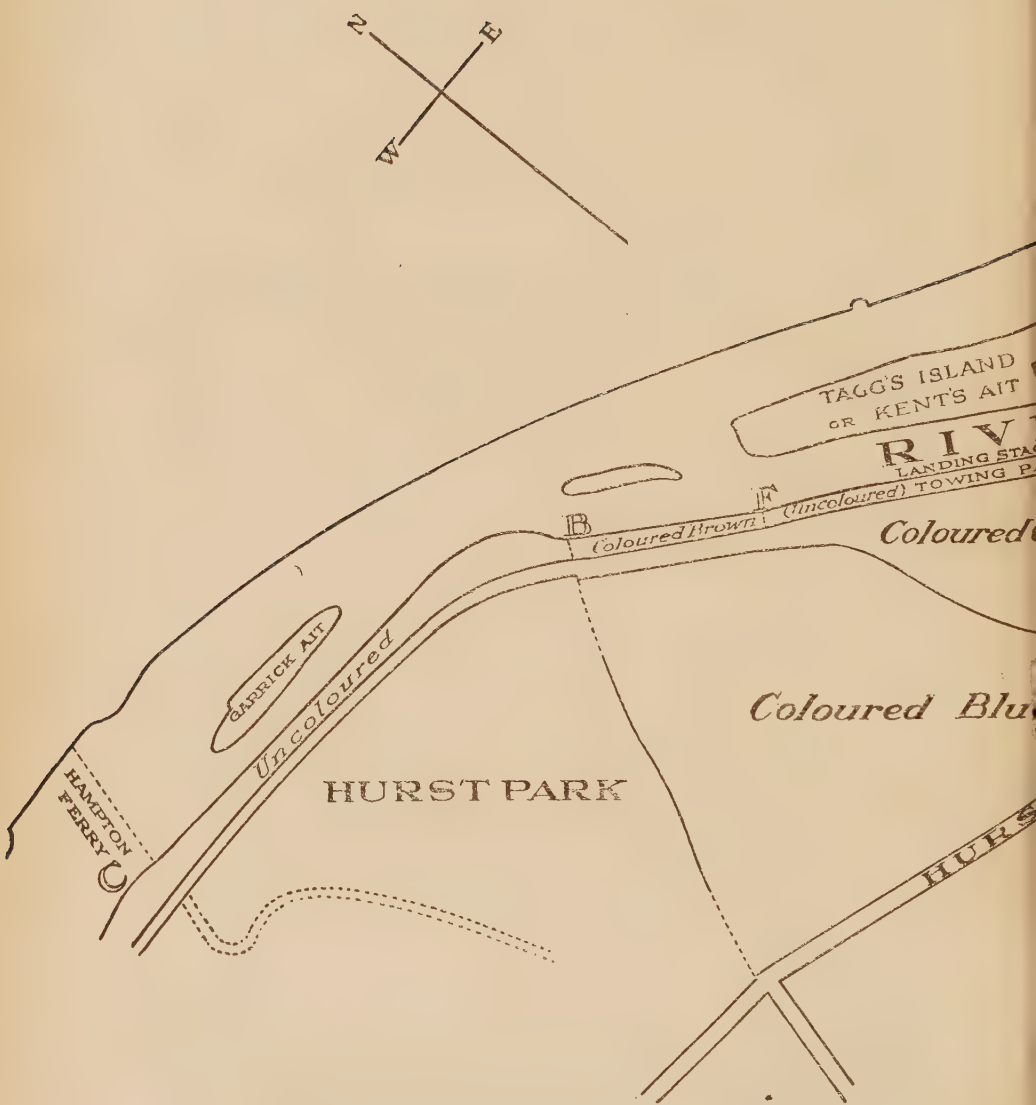
The questions raised are whether the public in general, or the Messrs. Kent in particular as the owners of their land, are entitled to use the towpath from Molesey Lock to the western boundary of Messrs. Kent's land, or some and what parts of it, for the purposes of vehicular traffic. It is conceded by the plaintiffs that there is a public footway along the whole of the towpath in question, but they dispute any further right on the part of the public, except, of course, the right to use the path for towing purposes.

The learned judge before whom the action was tried, Avory J., has found, against the contention put forward by the Messrs. Kent, that there is a public highway for all purposes over the towpath, and the Attorney-General does not dispute this finding.

It was conceded by the Messrs. Kent that any rights of passage vested in themselves or the public, and their own rights in portions at all events of the soil of the footpath, are subject to the rights and duties of the plaintiffs in reference to the navigation of the river, and to the rights of those who make use of the towpath for the purposes of navigation, and that such rights of the defendants and the public respectively, whether resulting from ownership of the soil or being in the nature of easements, cannot properly be exercised so as to obstruct or interfere with the use of the towpath for the purposes of navigation, or so as to injure the towpath itself, or impose a heavier burden on the plaintiffs for its maintenance than they would otherwise have to bear.

As to the alleged public right, I may say at once that I see no reason to disagree with the conclusion at which Avory J. has arrived; in fact I have some difficulty in seeing how, in the case of such a towpath as this is—not a made road; in many places barely wide enough to allow a vehicle to pass along in safety; and generally unsuitable for vehicular traffic—the unrestricted use of it by the public for such traffic can fail to interfere with the free use thereof for towing purposes or to add to the plaintiffs' burden in maintaining it in a fit condition for those purposes; and there is considerable evidence that it would in fact have that effect. So far, therefore, as concerns the alleged public right, the appeal fails.

The questions concerning the private rights of the Messrs. Kent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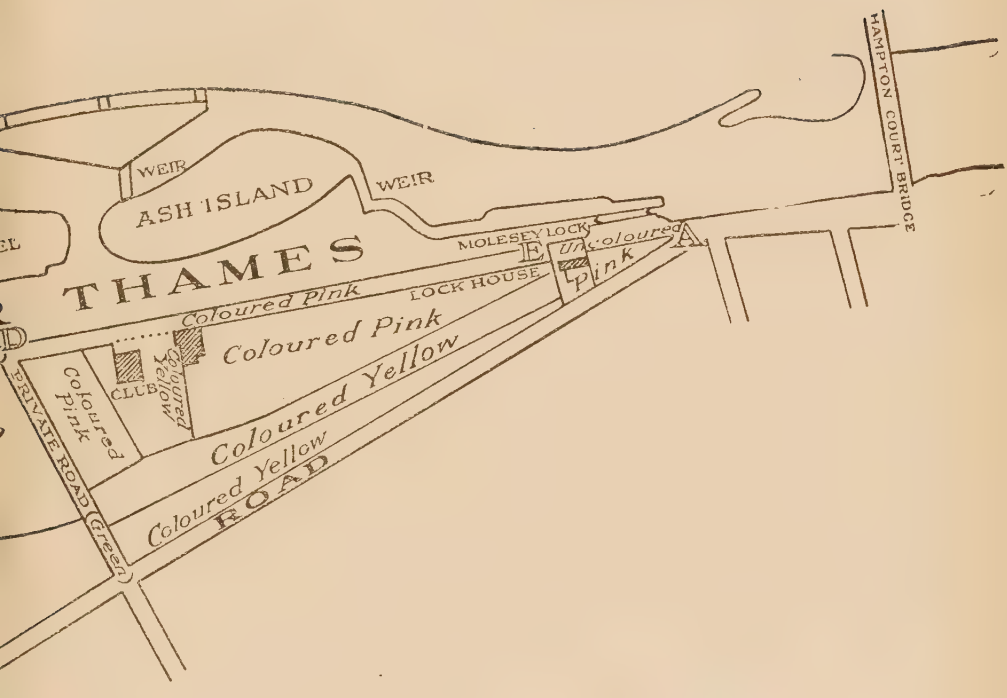
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CLUB
Coloured Yellow
Coloured Yellow
Coloured Yellow
PRIVATE ROAD (Green)
ROAD

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require more detailed investigation. The position can, I think, best be explained by a printed plan annexed to the judgment of the King's Bench Division. Two parcels of land are there delineated, the one being coloured pink and yellow, the other green and blue. These lands, together with a portion coloured brown on the plan and the piece of towing-path uncoloured between the letter A and the pink, were at one time the property of the Messrs. Kent or their predecessors in title, and the pink and green lands and a part of the yellow remain vested in them. They also claim so much of the towpath as lies between the western limit of the pink and the eastern limit of the brown. Avory J. has held that they are entitled in fee simple to the soil of so much of the towpath as is coloured pink, and to a right of way for all purposes over the uncoloured portion between A and E as appurtenant to the land coloured pink, but he has found against their claim to the soil of the uncoloured portion between the pink and the brown, and also all claim to a right of way over that portion westward of the point D or over the brown.

The Messrs. Kent insist in this appeal that the learned judge was wrong in rejecting their claim to the soil of the uncoloured portion of the towpath between the pink and the brown and their claim to a right of way over the brown, and they also claim to be entitled to the soil of some part of the portion between the point A and the pink. As to this last claim, I may say at once that I think they fail, and that the whole of that piece was conveyed by their predecessors to the Corporation of London, the predecessors of the plaintiffs.

The plaintiffs, by a cross-notice, seek to have reversed the finding of the learned judge that the defendants the Messrs. Kent are entitled to a right of way over the uncoloured portions of the part marked A to D. They do not dispute the Messrs. Kent's title to the soil of the pink portion. I propose to deal first with the claim of the Messrs. Kent to the soil of the uncoloured portion between the pink and the brown.

The case of the Messrs. Kent is that the soil of this, the uncoloured part of the towpath, was conveyed to them by the representatives of one Todd, by a conveyance dated December 11, 1850. The point is that the land, the description of which is material, is therein described, by reference to a plan, as bounded by the towpath. The towpath is a highway, and it borders another highway, namely the

river, and the Messrs. Kent say that, by the application of the well-known presumption governing the construction of conveyances of land bordering on a highway, the conveyance passed the soil usque ad medium filum aquae. The plaintiffs admit the existence of the presumption, but they say it is excluded on the true construction of the conveyance in question. It is necessary, in order to determine this question, to go back to the earlier title. In the year 1815 an Act (55 Geo. 3, c. cx.) was passed for enclosing certain commons and waste lands in the parishes of East Molesey and West Molesey, and in the preamble it is stated that Lord Hotham and Sir George Berkeley were the principal proprietors of the lands within those parishes. The award under this Act was made on June 1, 1821, and it appears by the plan annexed to that award that the bulk of the land above referred to as coloured green and blue was the property of Lord Hotham and Sir George Berkeley. A small portion of this green and blue land, in the award referred to as allotment No. 198, was awarded to Lord Hotham and Sir George Berkeley, and is thereby described as bounded on the north by the towing-path and on other sides by "old enclosures" of the same persons. These "old enclosures" include that part of the green and blue land which borders on the river, except allotment No. 198. By the same award the pink and yellow lands, together with the uncoloured portion of the towpath between the pink and the point A, were allotted to the King, and the towpath is referred to as being across these allotments. The King's allotments were purchased by Lord Hotham and Sir George Berkeley. The westernmost of these allotments is described as bounded on the west by the old enclosures above mentioned; and I think it results from this description that the portions of the towpath west of the King's allotments formed part of the old enclosures. The same conclusion results from the application of the presumption above referred to. The uncoloured portion now in question is part of that which was included in the old enclosures. The rest of it, and that which bordered the allotment No. 198, passed to the plaintiffs by a conveyance dated January 19, 1831, and are included in the brown land on the plan annexed to the judgment below.

In my opinion, therefore, the uncoloured portion now in question was at the date of the award vested in Lord Hotham and Sir G.

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Berkeley as part of their old enclosure. The subsequent title is as follows: By a conveyance dated September 5, 1821, the old enclosure was, with other land, conveyed to one Joseph Todd. The deed itself is lost, but it is recited in the conveyance of January 19, 1831, constituting the plaintiffs' title to the brown land, and I do not understand that there is any dispute as to the fact. I think it must be presumed that the towing-path passed by this conveyance to Todd. Todd died on June 11, 1835. By a conveyance of December 11, 1850, the pink and yellow land and the green and blue land, with other lands, were conveyed by the trustees and the tenant for life under Todd's will to the predecessors of the defendants Kent. It is on the construction of the parcels in this deed that such question as there is arises. There is great difficulty in identifying the land in question by the detailed description in this deed, and I think it is unnecessary to do so inasmuch as the entire land conveyed is ultimately referred to as described "in and by the plan or ground plot thereof drawn in the margin of these presents and therein coloured red." The plan shows the material portion of the land conveyed as being bounded by the towpath, and the latter is not coloured red, whereas the pink portion is so coloured, and it is contended, and Avory J. has held, that the ordinary presumption is excluded, and that the portion of the towpath not coloured red did not pass by the conveyance. The result would be somewhat extraordinary, inasmuch as to arrive at it is to impute to the parties the intention that the towpath should remain vested in Todd's representatives.

I am of opinion, however, that this is not the true effect of the conveyance. The rule is well settled that the presumption in question is not excluded by the fact that the parcels are described by metes and bounds, or that the quantities are minutely stated, or that they are conveyed by reference to a plan and are so coloured therein as not to include the highway by which they are bounded. The rule is stated in the following terms by Cotton L.J. in *Micklethwait* v. *Newlay Bridge Co.* (1): "In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true

(1) (1886) 33 Ch. D. 133, 145.

construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to shew that that is not the intention of the parties. It is a presumption that not only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded, is intended to pass, but that presumption may be rebutted." Is there anything in the deed in question sufficient to exclude the presumption? The circumstance relied upon is the different treatment, on the plan, of the pink land and of the green. But there is an obvious reason for this in the fact that, whereas the pink land was part of an allotment in which the towpath was so included, and is so shown on the plan annexed to the award, there was no similar early description of the green land, which was therefore dealt with in the ordinary way and represented as bounded by the towpath. It is to be noticed also that the roads which bound the land conveyed, and even one which intersects it, are not coloured red, and it is impossible to suppose that it was intended to exclude the presumption as regards these roads.

On the whole, then, I come to the conclusion that not only the pink portion of the towing-path, but that portion also which lies between the pink and the brown, is vested in the defendants Kent, subject, of course, to the rights of the Conservators and the public, and that they are entitled as such owners to use the towing-path for all purposes, provided they do not thereby interfere with or obstruct its user for purposes of navigation, or so injure the surface as to cast a greater burden on the Conservators in the performance of their duty to maintain it than they would otherwise have to bear.

It remains to consider whether the defendants Kent are entitled to a private right of way for vehicles over any, and if any what, portion of the towing-path the soil of which is not vested in them. I agree with Avory J. that they have not succeeded in establishing such a right of way over the brown portion. He has, however, found that they are entitled to a right of way for all purposes, as appurtenant to the pink land, over the uncoloured portion between the pink and the point A. Is this finding correct? The way is not claimed, and could not be claimed, as a way of necessity, nor, having regard

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to the title, can it be claimed by prescription at common law. The right, if any, can therefore be only founded on the statute. The way, of course, must be claimed as appurtenant to some land, and the only land vested in the Messrs. Kent is the pink and (having regard to the views above expressed) the green land. There is evidence of fairly continuous vehicular traffic over the portion in question in connection with two clubs, one called the Milner Club, standing on land vested in the defendants Kent subject to a lease, the other called the Hampton Court Club, standing on land conveyed by the Kent trustees to one Tagg in the year 1890. The land so conveyed was not bounded by the towpath, but by a 40-feet strip retained by the Kent trustees thereon. The Milner Club was not built until the year 1899, and therefore any user of the path in connection with that house has not been long enough to establish a right. As regards the Hampton Court Club, even if the user is otherwise sufficient, it would establish a right of way in Tagg, as appurtenant to his land, over that part of the towing-path which is vested in the Conservators and that part which is vested in Messrs. Kent, and would not establish any right of way in the Messrs. Kent themselves. The same remark applies to the evidence as to traffic connected with the inn and boathouses on Tagg's Island. Such evidence cannot, in my opinion, establish a way as appurtenant to the land for which it is now claimed.

Assuming for this purpose that the evidence shows an easement appurtenant to the Hampton Court Clubhouse, and to Tagg's Island and the buildings thereon, the passage over Messrs. Kent's lands is a mere incident of that easement, and is not for the benefit of the lastly mentioned lands or connected with their occupation or enjoyment. If this is so, such passage would not be sufficient to establish an easement appurtenant to those lands: see *Ackroyd* v. *Smith*. (1) [His Lordship then disposed of other evidence of the defendants Kent as to the alleged right of way for vehicular traffic as appurtenant to their land, and continued:] On the whole, I think the defendants Kent fail to establish a right of way for vehicular traffic over the portion from the point A to the pink. The result is that their claim to a right of way, as distinct from ownership, fails altogether.

(1) (1850) 10 C. B. 164, 187.

I will now consider how far the order of the King's Bench Division is correct, and the form of the order which ought in my opinion to be made by this Court.

The declaration against the alleged public right is in substance correct. It refers, however, to the whole length from A to C, although the owners of the soil between B and C were not before the Court. I think it ought to be confined to the part lying between A and B.

The next declaration must be altered. It is inaccurate in form, inasmuch as it declares that the defendants Kent are entitled to a right of way over their own land, and, having regard to the opinions above expressed, it is wrong in substance. I think there should be substituted for it a declaration in the form expressed in the minutes of the order, which I will read presently. If the plaintiffs insist, I think they are entitled to an injunction restraining the use by the defendants Kent of those portions of the towing-path which are vested in the plaintiffs, for traffic other than foot traffic, but they are not entitled, in my opinion, to any injunction relating to that part of the towing-path which is vested in the defendants Kent. These defendants have never threatened or intended to exercise their rights as owners further than they will now be declared entitled to use them, and there would be no ground for an injunction founded on such threat or intention. If the plaintiffs rely on their by-law 57 as entitling them absolutely to exclude all vehicular traffic—even when it takes place in exercise of a private right, whether of ownership or by way of easement, or whether it interferes with the use of the towing-path or does injury to it or not—the by-law would, in my opinion, be clearly ultra vires.

The result is that the appeal succeeds so far as the defendants' right of ownership is concerned, and fails in other respects. The cross-notice, on the other hand, succeeds so far as concerns the portion between the point A and the pink, and fails as to the portion between D and the pink.

As to the costs of action, I think the plaintiffs ought to have the costs relating to the issues as to both public and private rights of way, and the defendants Kent the costs relating to the issues as to ownership, with a set-off. As each appeal partly succeeds and partly fails, I think the fair thing would be to give no costs on either side

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in this Court. Of course, the Attorney-General neither pays nor receives costs. (1)

SCRUTTON J. The Conservators of the river Thames brought an action against two gentlemen of the name of Kent, whom I call "the Kent trustees," in respect of a stretch of towpath on the Surrey side of the Thames, to the west of Hampton Court Bridge, from Molesey Lock up to Hampton Ferry. As public rights of way were in question, the Attorney-General was joined as a defendant. [His Lordship stated the effect of the statement of claim and the defence of the Kent trustees, and continued:] The Attorney-General did not contend that there was any public right of way, except, as was admitted, for foot passengers or for the purpose of towing by horses. [His Lordship stated the effect of the decision of Avory J. and continued:] From this judgment both the plaintiffs and the defendants appealed, the Thames Conservators against the allowance of a private right of way, the Kent trustees against the disallowance of a public right of way and the refusal to recognize their ownership in fee of certain parts of the towpath.

It is necessary in the first place to state clearly the different parts of the towpath in question and their legal ownership. The towpath is shown on a map annexed to the judgment. The pleadings and the judgment dealt with the towpath between the letter A, where it left the Hurst Road to the east of Molesey Lock, and the letter C, at Hampton Ferry. But, as no owner of the soil of the towpath from C, or Hampton Ferry, to a letter B, where the Kent trustees' land adjoining the towpath ended, was before the Court, it was conceded that the rights in the towpath from C to B could not be dealt with by the judgment of this Court.

Commencing then at A, and proceeding westward, there is, first, an uncoloured length of towpath stretching to a point just beyond Molesey Lock. This, it is conceded in this Court, is the property in fee simple of the Conservators under two deeds of June 30, 1820, and September 4 and 5, 1821, each conveying a moiety. These deeds do not reserve or refer to any rights of way over the land.

(1) The effect of the judgment, as drawn up, is stated at the end of the judgment of Scrutton J.

Secondly, there is a length of towpath coloured pink, which came to the predecessors in title of the Kent trustees under the enclosure award for the parishes of East Molesey and West Molesey, dated June 1, 1821, and is therein described as "bounded on the north by the river Thames . . . . subject nevertheless, and to be without prejudice and obstruction, to the towing-path upon or near the banks of the river Thames." The enclosure map shows the towpath as included in the land allotted. This land was conveyed by the representatives of one Todd to the Kent trustees in 1850, the deed describing it as "subject to and including the towing-path along the river Thames." Of this part of the towing-path, therefore, the Kent trustees were owners in fee simple, subject to a right of way for foot passengers, and to the existence of the public right of towing. This private portion ran nearly up to the point in the towing-path where a private occupation road, belonging to the Kent trustees and coming from the Hurst Road, joined the towing-path, and nearly up to a ferry to Tagg's Island, which island also belonged to the Kent trustees, though any rights of way appurtenant to it were not claimed or directly involved in the present action.

Thirdly, there is a long uncoloured stretch of path, D to F, adjoining land now belonging to the Kent trustees. This land was, at the time of the enclosure award, an old enclosure belonging to Lord Hotham and Sir George Berkeley. It was conveyed by them to one Todd, the deed being now lost; and in 1850, by the same conveyance which conveyed the pink land, it was conveyed by Todd's representatives to the Kent trustees, being described as "bounded on the north in part by the towing-path of the river Thames . . . . adjoining the Thames, bounded by the river Thames or towing-path." In the Court below and before us the Conservators said that the difference in the language of the conveyance of 1850, between the conveyance of this land and of the pink land, showed that the latter did and the former did not include the towing-path. They declined, however, to hazard any conjecture as to whom this uncoloured portion of the towpath did belong. The Kent trustees argued that the construction of the deed as to this land followed the well known rule of construction stated by Cotton L.J in *Mickle-thwait* v. *Newlay Bridge Co.* (1) [which his Lordship read]. The

(1) 33 Ch. D. 133, 145.

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Kent trustees therefore contended that their land, though stated to be bounded by the towpath, extended to the middle of the river adjoining. The learned judge took the view that the fact that in the same conveyance other soil was conveyed "including the towpath," excluded the presumption in a case where the towpath was not expressly included but was stated as a boundary, and that in any case the presumption would only extend to half the soil of the towpath. I am unable to take this view. The land adjoining the pink towpath and the land adjoining the uncoloured towpath, D to F, come from two titles—the pink from the enclosure award, and the uncoloured an old enclosure. If the two titles were dealt with separately in two deeds, I see no reason why the ordinary presumption should not apply to the uncoloured land, and, if so, I see no reason why it should not apply when the two distinct titles are dealt with in the same deed. And I see no reason why, when the land is bordered by two ways, towpath and river, the presumption should be limited to the nearest way and should not cover part of the furthest way. It is not necessary in this case to decide the extreme river limit of the trustees' land, especially as they appear to own the soil of at least one island lying opposite the uncoloured land. But I am satisfied that the Kent trustees are the owners of the uncoloured towpath, between the pink and the brown, subject to the public right of way for foot passengers, and for towing, and to the rights of the Conservancy as hereafter discussed.

Fourthly, a piece of ground now in the towpath, coloured brown, was expressly conveyed in 1831 by Todd to the City Corporation, predecessors in title of the Conservators, in fee simple. Between this and the river there was another piece of towpath. Counsel for the Kent trustees agreed that the presumption of which they claimed the benefit in respect of the uncoloured towpath, D to F, would also give the owners of the brown towpath the soil of the towpath between the brown land and the river. The Conservators must therefore be treated as owners in fee simple of the towpath coloured brown, subject to the public right of way for foot passengers and to the towing rights.

In the result, the towpath from A to B, with which alone the Court can deal in this action, includes at each end a piece of towpath

belonging to the Conservators, and in the middle a long stretch (pink and uncoloured) belonging in fee to the Kent trustees. They can obtain access to this long stretch by their occupation road near D. It is their own soil, and they can do what they like on it, subject to the public right for foot passengers and to the rights of the Conservancy.

The towpaths of the Thames fall into two divisions; those parts which belong to the Conservators, and those which do not but over which the public have a right of passage for towing and the Conservators have statutory rights for preserving and protecting the public right of navigation by towing. As the Conservators take one general toll for the use of all towpaths, whether owned by them or not, it has been decided that, even as to towpaths where they do not own the soil, they are under an obligation to those whom they invite to use the towing-path to take reasonable care, either by repairing damage or giving warning of it, to see that the towpath is in such a state as not to expose those using it to undue danger: *Winch* v. *Thames Conservators*. (1) They have power to remove obstructions to the towpath, whether in parts which they own or in other parts (Thames Conservancy Act, 1894, s. 78; and see s. 82), and to make by-laws "for the government, good order, and regulation of persons . . . . using the towpaths," or for preventing disorderly conduct or the use of bad language to the annoyance of persons using the banks or towpaths of the Thames (Act of 1894, s. 191). But in my view, unless what is being done obstructs the use of the towpath for navigation, or injures the towpath, or contravenes by-laws made within the powers of the Conservators, they cannot interfere with a person on the towpath in places where they do not own the soil. For instance, to ride a bicycle or drive a light cart along the towpath coloured white and pink, belonging to the Kent trustees, when no barge is being towed anywhere near that part of the river, will not interfere with the navigation; and need not—probably will not—damage the towpath. In such a case, in my view, the Conservators have no power to interfere, even though the person riding or driving is, as against the Kent trustees, a trespasser, still less where he is riding or driving by their permission. I refer, without reading it, to the instructive passage in *Lee*

(1) (1874) L. R. 9 C. P. 378, 388.

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Conservancy Board v. *Button* (1), where Cotton L.J. explains this position. But, where the act committed does obstruct the navigation or damage the towpath, the Conservancy have the right and duty to interfere though the act is done on soil which does not belong to the Conservators. And it may be that, while the act itself does slight damage, a succession of such acts, if repeated, may seriously damage or destroy the path. A series of carts or motors, each doing a little damage, may render the path impassable, and in such a case it would be no answer to the person driving the cart to say "I have only done slight damage." It is a question of degree and evidence in each case. It is necessary to state this, because the Conservators have asked by their writ a declaration that the public have no right to use the towing-path except on foot or for towing, without reference to whether the Conservators own the soil or not, and a declaration as to their rights in respect of the towing-path and their power of restricting, regulating and controlling the user of the towing-path, and have proved before us a number of convictions in this part of the path under their by-law 57. That reads as follows: "No person shall ride or drive any horse" on the towing-path "except when towing a vessel or drive any cart, wagon or other vehicle over or upon any part of the towing-path, unless there be a public right of way for such cart wagon or other vehicle." (2) This by-law, as it stands, prohibits a man riding a horse or bicycle on his own land when no towing is going on and when he does not damage the towing-path, or a light cart, under similar circumstances, whose owner is exercising a private right of way over land not belonging to the Conservancy. Such a by-law can only be justified, if at all, under "government, good order and regulation," which words do not, in my view, justify total prohibition where the conduct prohibited does not necessarily damage or injure the towpath or interfere with the free navigation of the river. This view is supported by the judgment of the Privy Council in *City of Toronto* v. *Virgo* (3), where a power to make by-laws to "license regulate and govern" hawkers was held not to justify a by-law forbidding hawkers from carrying

(1) (1879) 12 Ch. D. 383, 409, 410.

(2) For the Thames Conservancy By-laws, see Coulson and Forbes on the Law of Waters, 3rd ed., pp. 723, 732.

(3) [1896] A. C. 88.

on a lawful trade in certain localities, there being no question of apprehended nuisance.

In my view by-law 57 of the Thames Conservancy is ultra vires, and to make it valid it should be limited to acts damaging or injuring the towpath or interfering with its use as a towpath for the navigation of the river. If such acts had this effect, the public or private right of way on the towpath would not usually authorize them; if they had not this effect, the Conservancy has, in my view, no power to prevent them on the land of others. On the part of the towpath owned by the Kent trustees the Kent trustees may, in my opinion, do or permit any acts which do not damage or injure the towpath or interfere with the navigation of the river by towing or otherwise.

The remaining question is as to the rights, public or private, over the two pieces of towpath, brown at the west end, uncoloured at the east end, of which the fee simple is in the Conservators. Any rights existing over these must be by original reservation, express or implied dedication, or prescription. No rights were originally reserved, nor has there been any express dedication. The Conservancy, being a body holding land under statutory duties, cannot make dedications inconsistent with the proper performance of these duties. The law is stated by Parke J., in *Rex* v. *Inhabitants of Leake* (1) thus: "If the land were vested by the Act of Parliament in Commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the Commissioners have that power." The law is similarly stated by Jessel M.R. in *Mulliner* v. *Midland Ry. Co.* (2), and by the Court of Appeal, in respect of a dedication of a footpath on a towing-path, in *Grand Junction Canal Co.* v. *Petty.* (3) Where such an alleged dedication would involve the destruction of the statutory work said to be dedicated unless expense was incurred to prevent it, it was held ultra vires the company said to have dedicated: *Great Western Ry. Co.* v. *Solihull Rural Council.* (4) Where the jury

(1) (1833) 5 B. & Ad. 469, 478.
(2) (1879) 11 Ch. D. 611, 623.
(3) (1888) 21 Q. B. D. 273.
(4) (1902) 66 J. P. 772.

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found that there would be no material increase in the cost of upkeep and maintenance of the statutory work, the dedication was allowed : *Lancashire and Yorkshire Ry. Co.* v. *Davenport.* (1) The public right of way for foot passengers in this case can be upheld on this ground, as in *Grand Junction Canal Co.* v. *Petty.* (2) [His Lordship referred to the evidence, and continued :] I have formed the opinion that a dedication by the Conservators of a public right of way for all vehicles over their land forming part of the towpath (which would be useless unless it was also exercised over the rest of the towpath) would either destroy the towpath or put heavy extra expense on the Conservators in maintaining it, and would, therefore, be beyond their powers. The learned judge below found that there was no public right of way for vehicles over the towpath, not on the ground which I have stated, but on the ground that the evidence did not establish a continuous and uninterrupted enjoyment by the public as of right. In this view I concur, and indeed I do not understand that it was seriously argued that there was evidence on which a public right of way for vehicles could be established over the Conservators' part of the towpath coloured brown, or over the towpath from D to B. The appeal by the Kent trustees in respect of the alleged public right of way for vehicles therefore fails.

The question of the private right of way which the judge has found in favour of the Kent trustees presents more difficulty and requires careful and exact consideration. [His Lordship stated the decision of Avory J. on this point, and continued :] I do not understand a private right of way in fee simple for a man over his own land. The right of the Kent trustees as to carriages is merely the right of an owner to use his own land for purposes not interfering with the rights of the public to use the path for towing. And the part of the towpath over which these rights can be exercised extends, as I have said, from the white path east of the pink on the plan to the east end of the brown path, and does not stop at the point D as in the judgment below. As the Kent trustees have access to this part of the towpath by their accommodation road, they can use it freely for carriages, provided they do not damage the towpath or interfere with the towing. As an extensive use of the footpath in its present condition by vehicles must damage it, and will very probably interfere with

(1) (1906) 70 J. P. 129. (2) 21 Q. B. D. 273.

the towing if the towpath remains at its present width, it appears to me that to use this right the Kent trustees will have to make up the towpath as a road, protect it from erosion, and widen it at its narrow places. If they do this, they will have full vehicular access for any building they contemplate over their own land, without interfering with the rights of the Conservators.

But the judgment below goes further, and gives them a private right of way over the Conservators' uncoloured land at the east end of the towpath (although they are not given any right over the Conservators' brown land), and I do not understand that any claim was pressed in regard to that. The defence claimed the private right as appurtenant to lot 21 (the green on the plan), and to lot 20 (the pink and yellow on the plan) so far as vested in them in fee simple. What the defendants really want is "vehicular access to any houses they may erect along their river frontage." They can get this over their own land on the conditions I have already indicated. But if they want the vehicular access over the Conservators' soil, they cannot rely on a private way, which has reference to a dominant tenement on quite a different condition. As was said in *Wimbledon and Putney Commons Conservators* v. *Dixon* (1), where there is a right of way for a particular and limited purpose, there is no right to use the road for the purpose of erecting entirely new buildings, and then, after those buildings are erected, to use the road for the purposes of those buildings.

This renders it necessary to consider exactly for what purpose lots 20 and 21 used the uncoloured portion of the towpath vested in the Conservators. I can find no evidence that these lands used the towpath for agricultural purposes at all, although there is evidence that other lands, not belonging to the defendants, did. The only evidence of user appurtenant to the lands is in connection with buildings standing on lot 20; there appears to be no buildings at present on lot 21. I exclude all evidence directed to carts going to Tagg's Island or the houseboats in connection with it. Tagg's Island is not lot 20 or lot 21 or the subject of the present litigation, though incidentally I observe that the greater part of the buildings on it are quite recent, and that the ferry has only been made a carriage ferry quite recently. The buildings on lot 20, in connection

(1) (1875) 1 Ch. D. 362, 372.

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with which user has taken place, are—(1.) The Hampton Court Club, (2.) the Milner and Molesey Boat Club, and (3.) Tagg's boathouse. [His Lordship found that as to (1.) there was not twenty years' uninterrupted enjoyment as of right before the commencement of the action, and continued :] The fee simple of the Milner and Molesey Boat Club is not vested in the Kent trustees, but in members of the Kent family under another title. But there is in front of this a strip of land, 40 feet wide, vested in the Kent trustees. As, however, this clubhouse was only built in 1899, and there is no evidence of any premises existing there before, there has certainly not been twenty years' user as of right in respect of these premises, or the land in front of them, which alone can be the subject of this action. [His Lordship also found, as regarded (3.), that there was no such user as would give an easement, and continued :] All these three buildings, as also Tagg's Island, have independent access by the occupation road and the towpath whose soil is vested in the Kent trustees.

The learned judge below, in finding the private road, has not indicated exactly to what premises he finds it appurtenant, and his judgment does not seem to me to distinguish between the Kent trustees' rights over their own soil, and their easements over the land of others. I cannot hold that they have established the latter right as distinguished from the former.

I concur in the form of judgment read by Warrington L.J.

The judgment of the Court of Appeal, as finally entered, was, so far as material, as follows : " It is ordered that the said judgment be set aside, and in lieu thereof that judgment be entered for a declaration that the public are not entitled to go on or pass along the towing-path of the river Thames, situate and lying between the points respectively marked A and B on the plan annexed hereto, except on foot for all purposes whether of profit or pleasure, or with horses or other draught animals for the purpose of towing ; for a declaration that the defendants Charles William Kent and Francis Jackson Kent are entitled (subject to the statutory rights and duties of the plaintiffs, and to the right of the public to use the towing-path for the purposes of towing and as a footway for all purposes) to such part of the towing-path as lies between the points E and F on the said plan, for an estate therein in fee simple, and are accordingly entitled, by

themselves, or their tenants, or other person authorized by them, to use the same in such manner as they may think fit, but so as not to interfere with or obstruct the use of the same as a towing-path and otherwise by the public as hereinbefore mentioned, or to cause such injury or damage thereto as shall cast upon the plaintiffs any additional burden in respect of the maintenance thereof as a towing-path; for a declaration that the defendants Charles William Kent and Francis Jackson Kent are not entitled to any private right of way appurtenant to lots 20 and 21 in the pleadings mentioned, so far as the same respectively remain vested in them, over those portions of the towing-path which lie between the points A and E and B and F respectively on the said plan, such last-mentioned portions thereof being vested in the plaintiffs in fee simple; for the plaintiffs for an injunction restraining the defendants Charles William Kent and Francis Jackson Kent, their agents and servants, from going on or passing along the last-mentioned portion of the towing-path, or any part thereof respectively, with horses or other animals (except for the purpose of towing), carts, carriages, motors of any kind or description, bicycles, tricycles, or any other vehicles whatsover.

Solicitor for plaintiffs: *G. C. Corble.*

Solicitor for defendants Kent: *E. H. Stenning, for Kent & Son, Hampton, Middlesex.*

Solicitor for Attorney-General: *The Treasury Solicitor.*

F. E.

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Public Health—Nuisance—Notice to abate—Direction of Sanitary Authority—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 4, *sub-s.* 1; *s.* 5, *sub-s.* 1; *s.* 99, *sub-s.* 4.

By s. 4, sub-s. 1, of the Public Health (London) Act, 1891, "On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same. . . . ." By s. 5, sub-s. 1, "If . . . . the person on whom a notice to abate a nuisance has been served as aforesaid makes default in complying . . . . the sanitary authority shall make a complaint, and the petty sessional court hearing the complaint may make on such person a summary order. . . . ." By s. 99, sub-s. 4, "Where a sanitary authority appoint a committee for the purposes of this Act, that committee, subject to the terms of their appointment, may serve and receive notices, take proceedings, and empower any officer of the authority to make complaints and take proceedings in their behalf, and otherwise to execute this Act."

The public health committee of a sanitary authority under the above Act appointed their chairman to deal with urgent matters during the vacation, and this act was approved by the sanitary authority. During the vacation the medical officer of health reported to the chairman the existence of a nuisance, and the chairman directed that under s. 4 a notice to abate the nuisance should be served on the owner of the premises. The action of the chairman was approved by the committee at their first meeting after the vacation and likewise by the sanitary authority at their first meeting after the vacation. Subsequently to the last-mentioned meeting a complaint under s. 5 was made against the owner by an inspector acting on behalf of the sanitary authority, and the magistrate made an order for the abatement of the nuisance. A by-law of the sanitary authority provided that a chairman of a committee might, when the sanitary authority was in vacation, give instructions with respect to urgent matters, provided that such acts should be reported to the sanitary authority:—

Held (Atkin J. dissenting), that the effect of the by-law and of the ratification by the sanitary authority of the act of the committee in appointing the chairman to act in urgent matters was to

constitute him their agent for the purpose of directing service of the notice to abate the nuisance, and that as the act of the chairman had been ratified by the committee and the sanitary authority before the making of the complaint, the ratification related back to the time when the chairman directed the notice to be served and therefore the magistrate had jurisdiction to make the order.

Firth v. *Staines* [1897] 2 Q. B. 70 approved.

St. Leonard Vestry v. *Holmes* (1885) 50 J. P. 132 considered.

RULE NISI to a metropolitan magistrate to show cause against a writ of certiorari to quash an order made by him against the applicant for the abatement of a nuisance.

The applicant Arlidge was the owner of premises at 10, Aylesford Street, in the city of Westminster, of which the Westminster City Council was the sanitary authority. By-law 130 of the council provided that the mayor and the chairmen of the respective committees or either of them might, whenever the council was in vacation, give such instructions as might be requisite with respect to any urgent matters, provided that all such acts should in due course be reported to the council. On July 17, 1917, the public health committee, by resolution, appointed its chairman, and in his absence the acting vice-chairman, to deal with all urgent matters on behalf of the committee during the summer vacation. This act was approved of by the council on July 26. On September 21 the medical officer of health, having satisfied himself by inspection that a nuisance existed on the above premises, caused to be served on the applicant a written intimation under s. 3 of the Public Health (London) Act, 1891, of the existence of the nuisance. As the nuisance was not abated the medical officer of health reported it to the chairman of the public health committee, and as the matter was urgent the chairman, in exercise of the authority conferred on him on July 26 by the council, directed that a notice, pursuant to s. 4 of the Act, should be served on the applicant requiring him to abate the nuisance within seven days. This notice recited that the council was satisfied of the existence of a nuisance, and it was served on September 25. The action of the chairman was reported to the public health committee on October 9 (their first meeting after July 17), and was approved by them, and was reported by the committee to the council on October 18 (the council's first meeting after July 26), and was approved by the council.

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The nuisance not having been abated, a complaint was made on October 23 against the applicant by a sanitary inspector, acting with the authority of the council; and on December 5, 1917, the magistrate made an order for its abatement.

The rule was obtained on the ground that the order to abate the nuisance was made without jurisdiction, the notice of September 25, 1917, not having been given by the authority or direction of the council or the public health committee or after consideration by them, in pursuance of s. 4, sub-s. 1, of the Public Health (London) Act, 1891. (1)

McCall, K.C. (*Morton Smith* with him) showed cause. Although the notice of September 25 was not served by direction of the council or of the public health committee, it was validated by the subsequent approval of the public health committee on October 9: *Firth* v. *Staines*. (2)

[He was stopped by the Court.]

Brooke Little, in support. By s. 4, sub-s. 1, of the Public Health

(1) The Public Health (London) Act, 1891, s. 4, sub-s. 1: "On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose, and, if the sanitary authority think it desirable (but not otherwise), specifying any works to be executed."

Sect. 5, sub-s. 1: "If . . . . the person on whom a notice to abate a nuisance has been served as aforesaid makes default in complying with any of the requisitions thereof within the time specified . . . . the sanitary authority shall make a complaint, and the petty sessional court hearing the complaint may make on such person a summary order (in this Act referred to as a nuisance order)."

Sect. 99, sub-s. 4: "Where a sanitary authority appoint a committee for the purposes of this Act, that committee, subject to the terms of their appointment, may serve and receive notices, take proceedings, and empower any officer of the authority to make complaints and take proceedings in their behalf, and otherwise to execute this Act."

(2) [1897] 2 Q. B. 70.

(London) Act, 1891, the sanitary authority must be satisfied of the existence of a nuisance before the notice can be served. By s. 99, sub-s. 4, the sanitary authority may act by a committee. By s. 59 of the Metropolis Management Act, 1855, the quorum of the committee is three. By s. 8, sub-s. 2, of the London Government Act, 1899, the committee need no longer obtain the approval of the council for their acts, as was required by the proviso to s. 58 of the Metropolis Management Act, 1855. But the committee had no power to delegate their powers to their chairman. The committee could not subsequently ratify the act of the chairman: *St. Leonard Vestry* v. *Holmes.* (1) *Firth* v. *Staines* (2) is distinguishable. When that case was decided the proviso to s. 58 of the Metropolis Management Act, 1855, was still in force. In that case the act of the committee in directing service of the notice was held to be validated by the subsequent approval of the council. There the committee had statutory authority to do what they did, subject merely to the approval of the council. Here the chairman had no statutory authority to direct service of the notice.

ATKIN J. The question whether the magistrate had jurisdiction to make the order for the abatement of the nuisance depends on the terms of the Public Health (London) Act, 1891. Sect. 2 of the Act defines a nuisance. Sect. 3 provides that information as to the existence of a nuisance may be given to the sanitary authority by any person and shall be given to the sanitary authority by every officer of the authority, and it imposes on the officers of the authority the duty of giving a written intimation of the existence of the nuisance to any person who may be required to abate it. But that intimation, when given, does not in itself involve any consequent legal obligation on the person to whom it is given. By s. 4, sub-s. 1, the sanitary authority, on the receipt of information as to the existence of a nuisance, are to serve a notice requiring its abatement. If that notice is not complied with, then s. 5, sub-s. 1, comes into operation and the sanitary authority are to make a complaint and the petty sessional Court may make what is known as a nuisance order. The order in question in this case is an order of that kind, and I think it is clear—indeed I do not think

(1) 50 J. P. 132. (2) [1897] 2 Q. B. 70.

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it is disputed—that before an order under s. 5, sub-s. 1, can be made, a notice under s. 4, sub-s. 1, must have been served. It seems to me, therefore, to be a condition precedent to the obligation to comply with such a notice, and to the jurisdiction of the magistrate to deal with a default in complying with it after it has been served, that the sanitary authority should have been satisfied of the existence of the nuisance. "Sanitary authority" is defined by s. 99 of the Act of 1891, and by virtue of s. 4, sub-s. 1, of the London Government Act, 1899, is now the borough council, and s. 99, sub-s. 3, of the Act of 1891 incorporates the provisions of ss. 58 and 59 of the Metropolis Management Act, 1855, as to committees. By s. 58 of the Act of 1855, "It shall be lawful for the Metropolitan Board of Works, and the board of works for any district, and any such vestry respectively, to appoint a committee or committees for any purposes which, in the discretion of the board or vestry, would be better regulated and managed by means of such committee, and at any meeting to continue, alter, or discontinue such committee: Provided always, that the acts of every such committee shall be submitted to the general body of the board or vestry appointing such committee for their approval," but that proviso has now been repealed by s. 8, sub-s. 2, of the London Government Act, 1899, and the Third Schedule thereto. Sect. 58 of the Act of 1855 in other respects remains in force, and so does s. 59 of the same Act. Sect. 59 of that Act provides: "Every committee so appointed may meet from time to time, and may adjourn from place to place, as they may think proper, for carrying into effect the purposes of their appointment; but no business shall be transacted at any meeting of the committee unless three members of the committee are present." Now it is contended that no proper notice had been given under s. 4, sub-s. 1, of the Act of 1891, because neither the council nor the public health committee had been satisfied of the existence of a nuisance, but only the chairman of the committee, and that therefore the condition precedent to the making of a nuisance order had not been fulfilled. In my opinion, that is a sound contention. The facts of this case are almost identical with those in *St. Leonard Vestry* v. *Holmes*. (1) In that case proceedings had been taken under s. 81 of the Metropolis Management Act,

(1) 50 J. P. 132, 133, 134.

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1855, which provided that if it appeared to the vestry that any house was without a sufficient water-closet, &c., the vestry should give notice in writing to the owner or occupier, requiring him to provide the apparatus, and, if the notice was not complied with, the vestry might do the work and recover the cost from the owner. There the sanitary inspector had on August 8, 1884, given notice to the owner of a house to reconstruct the drains, and on August 26, after consultation with some members of a sub-committee of the general purposes committee of the sanitary authority, a second notice was served requiring the work to be done, and on the following day the sub-committee executed the work themselves. On September 2 the action of the sub-committee and of the inspector was approved by a resolution of the vestry, and on December 19 proceedings were taken before a magistrate to recover the cost of the work. Upon those proceedings it was contended that no notice had been served in compliance with s. 81 of the Metropolis Management Act, 1855, as the vestry had not been satisfied that there was not a sufficient water-closet, &c., but it was only the sub-committee that had been satisfied, and that therefore the money could not be recovered. It was held that that contention was correct. In the course of the argument Day J. said: "Where is the authority to the inspector to give the notice in this case? You must show that the inspector is the vestry, to comply with the statute." So in the present case, in order to comply with the statute, it is necessary to show that the chairman is the committee. In his judgment Day J. said: "I think in this case the magistrate was quite right, and that the notice given by the inspector was utterly bad. There is nothing to show that the vestry ever gave any authority to order these particular works to be done, so as to comply with the 81st section of the Act. It is important that the vestry should exercise a discretion in each case, and it is not enough that the inspector does what he pleases, and then relies on his acts being afterwards approved by the vestry. It is true the vestry may appoint a committee to exercise the discretion, and that committee may appoint a sub-committee, but the sub-committee can only report to the committee, and that was never done. Therefore the vestry had never exercised any discretion in this matter. I entirely agree with the magistrate, and would hold this mode of giving notice to a person to do this kind of

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work in three days or next morning most unreasonable, even if he had had the requisite authority." A. L. Smith J. was of the same opinion. It appears to me that that case is entirely on all fours with the present, and I think that the reasoning adopted there applies here. These powers are discretionary in the sense that they require the deliberation of the public authority which is appointed to exercise them. The discretion may by statute be exercised by a committee, but not otherwise. It is not sufficient for the discretion to be exercised by one member or officer, but the discretion must be that of the persons to whom the statute has confided it. In my opinion it is important that this principle should be maintained when large powers are entrusted to public representative bodies. Confidence is placed in those bodies because they are representative, and their decisions are intended to be the result of deliberation.

In the case of *Firth* v. *Staines* (1) a public health committee had been appointed by the vestry and a written intimation under s. 3 of the Act of 1891 had been served on September 19, 1896, on the owner of the premises on which the nuisance existed, and on October 15 the public health committee passed a resolution that notice to abate the nuisance be served on the owner. On October 19 the appellant served on the respondent a notice under s. 85 of the Metropolis Management Act, 1855. That notice was not complied with, and proceedings were taken for a penalty under s. 64 of the Metropolis Management Act, 1862. After the issue of the summons the proceedings of the committee were reported to the vestry and were approved by a resolution of the vestry. In that case, so far as the committee were concerned, everything was in order. They were satisfied that a nuisance existed, they authorized the notice, and they authorized the taking of proceedings. When that case was decided the proviso to s. 58 of the Metropolis Management Act, 1855, was still in operation, and if in fact the vestry had approved the act of the committee before the notice were served no question would have arisen. The only question that did arise was whether the approval by the vestry of the act of the committee after the committee had acted was sufficient, and it was held that the approval was sufficient. Hawkins J. said: "The committee

(1) [1897] 2 Q. B. 70, 74, 75.

are appointed for 'purposes which in the discretion of the vestry would be better regulated and managed by means of such committee.' But if at each step in the execution of their powers the committee are first to obtain the sanction of the vestry, the whole object of their appointment is lost, and the section under which they are appointed might just as well be omitted from the Act. Under such conditions the committee could be of no possible use. Moreover, what the vestry are, under the proviso, required to approve is the 'acts' of the committee; and until the committee have acted there is nothing for the vestry to approve. What I think the proviso means is that, if the committee are called upon to justify their acts, they will be unable to do so unless they show an approval of the vestry given at some time or other." With every word of that reasoning I agree. I think that that decision was right and that it is not inconsistent with *St. Leonard Vestry* v. *Holmes.* (1) In *Firth* v. *Staines* (2) Wright J. said: "I think the case must be decided upon the ordinary principles of the doctrine of ratification. To constitute a valid ratification three conditions must be satisfied: first, the agent whose act is sought to be ratified must have purported to act for the principal; secondly, at the time the act was done the agent must have had a competent principal; and, thirdly, at the time of the ratification the principal must be legally capable of doing the act himself. I think that all those conditions were satisfied here. Therefore, upon the approval of the vestry being given, the acts of the committee became valid as from the time when they were done." That appears to me to be correct, because there was no question that the committee had statutory authority to exercise the discretion which must be exercised before the notice is given.

It is, however, contended that that principle is applicable to everything done under the Public Health (London) Act, 1891. That would result in very far-reaching consequences, for it would justify not only the act of a member of the committee or of an officer of the committee, but the act of any third person not connected with the public authority, provided that he purported to act on their behalf. That is the whole principle of ratification. To introduce the principle of ratification of an act one starts with

(1) 50 J. P. 132. (2) [1897] 2 Q. B. 70, 74, 75.

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the assumption of the absence of authority to do the act. If this principle is to be applied, a notice to abate a nuisance could be given, not merely by an officer of the public body, but by any person purporting to act on behalf of the authority having the power to give the notice. I do not think that that is the true position. The true line of demarcation appears to me to be that if the act is done by a committee who are given by statute authority to exercise the discretion of the council it will be valid if afterwards adopted by the council. But if it is done by a person to whom no discretion is given it is invalid. My view, therefore, is that the rule should be made absolute.

AVORY J. I have, with some doubt, arrived at a contrary conclusion. The question is whether the order made by the magistrate on December 5 was made without jurisdiction on the ground that the notice served on September 25 had not been given by the authority or direction of the council or the public health committee. It is to be observed that under s. 3 of the Public Health (London) Act, 1891, it is the duty of every officer of the sanitary authority to give the sanitary authority information of the existence of a nuisance and to serve on any person who may be required to abate the nuisance a written intimation of its existence. In this case the information was given, and the written intimation was served by the medical officer of health, who is the most appropriate officer for carrying out that section. It is true that s. 4, sub-s. 1, requires that on receipt of any such information the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance it arises or continues. But the fact of that notice being served by the sanitary authority does not in any way conclude the question whether there is a nuisance in fact existing. That is a question of fact which has to be determined by the magistrate on the summons, and therefore it does not appear to me that the provision in s. 4, sub-s. 1, as to the sanitary authority being satisfied of the existence of a nuisance has the importance which my brother Atkin attaches to it. In this case it is not disputed that the complaint was made by the sanitary authority. The complaint was made on October 23. At that date not only the public health

committee but the council itself had approved every step previously taken, and there is no question that the complaint was made by the authority of the council. The magistrate determined that the nuisance in fact existed, that the applicant was the person by whose act, default, or sufferance it arose, and he made an order on the applicant for its abatement.

It appears to me that the case is governed by the decision of this Court in *Firth* v. *Staines*. (1) The whole of these proceedings, which were apparently initiated under by-law 130, were approved by the council on October 18, before the proceedings before the magistrate were begun. In these circumstances the question is whether the notice of September 25 can properly be treated as a notice served by the sanitary authority within the meaning of s. 4 of the Act of 1891. It is true that neither the council nor the public health committee nor a quorum of the committee had, before the service of that notice, been satisfied of the existence of a nuisance. In practice they are probably satisfied by the report of their medical officer, and I do not suppose that they ever go to the premises for the purpose of satisfying themselves. Now *Firth* v. *Staines* (1) shows that if the act of the officer of the council, who is a duly authorized agent of the council, has been approved and ratified by the council before any proceedings by way of complaint are taken, that approval and ratification relate back to the time when the act was done, and the act becomes a valid act under the statute. In the case of *Firth* v. *Staines* (1) the ratification was actually subsequent to the issue of the summons, and therefore the present is an à fortiori case, for here the ratification was prior to the issue of the summons. There Wright J. said: "I think the case must be decided upon the ordinary principles of the doctrine of ratification. To constitute a valid ratification three conditions must be satisfied: first, the agent whose act is sought to be ratified must have purported to act for the principal; secondly, at the time the act was done the agent must have had a competent principal; and, thirdly, at the time of the ratification the principal must be legally capable of doing the act himself. I think that all those conditions were satisfied here. Therefore, upon the approval of the vestry being given, the acts of the

(1) [1897] 2 Q. B. 70, 75.

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AVORY J.

committee became valid as from the time when they were done." My brother Atkin has pointed out that all that the Court decided in that case was that the act of the committee might afterwards be ratified by the council, but it seems to me that the principle equally applies to the act of any authorized agent of the council. If it applies to an act of the committee it is only because they are agents of the council. They are statutory agents, it is true, but I think that in this case the effect of the by-law and of the ratification by the council of the resolution of the public health committee appointing the chairman to act in urgent matters is to constitute the chairman the agent of the council for the purpose of dealing with matters of urgency during the vacation. I do not agree that the result of so holding would be to enable any person outside the council to serve a notice of this kind and then obtain its ratification. In the case of *Firth* v. *Staines* (1) Wright J. was dealing only with the act of an agent, and, in order to come within the principle which he laid down, the person must at the time of the act be at least an authorized agent. If that case is not consistent with the earlier case of *St. Leonard Vestry* v. *Holmes* (2), though I am not myself satisfied that they are inconsistent, I prefer to follow *Firth* v. *Staines*. (1) There appears, however, to me to be a substantial distinction between *St. Leonard Vestry* v. *Holmes* (2) and the present case. In that case there was nothing resembling by-law 130 and giving the inspector authority to act as he acted in that case. There the act of the inspector was not in any way authorized by any by-law or by a resolution of the public health committee. That fact distinguishes that case from the present, and, whether that be so or not, I think we should follow *Firth* v. *Staines* (1), which is a sufficient authority for holding that the act of the chairman in directing service of the notice under s. 4, having been subsequently ratified by the public health committee and the council, was thereby made a valid notice under s. 4. The magistrate therefore had jurisdiction and the rule should be discharged.

I may add that s. 99, sub-s. 4, of the Act of 1891 supports the view which I have taken—for this reason, that by-law 130, which has not been suggested to be ultra vires, must be taken to form part of the terms of the appointment of the committee,

(1) [1897] 2 Q. B. 70. (2) 50 J. P. 132.

and therefore to authorize them to appoint their chairman to deal with matters in the vacation.

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DARLING J. This case is one of considerable difficulty. The objection taken to the notice of September 25 is the purest technicality. I cannot doubt that the notice was issued and the other steps were taken with as much consideration as if the council had actually been sitting. The only question is whether there is any technical defect which renders the proceedings nugatory. If steps cannot be taken as they were taken in this case, the public will in the vacation be exposed to great danger, for it will be very difficult to enforce the Act during that period. For the reasons given by my brother Avory I think that the rule should be discharged.

Rule discharged.

Solicitors: *Allen & Son; Rubinstein, Nash & Co.*

J. E. A.

HOLDER, APPELLANT *v.* McCARTHY, RESPONDENT.

1918
April 25.

Old Age Pension—False Representation—Disqualification—Old Age Pensions Act, 1908 (8 *Edw.* 7, *c.* 40), *s.* 9—*Old Age Pensions Act*, 1911 (1 *& 2 Geo.* 5, *c.* 16), *s.* 6, *sub-s.* 4.

By s. 9 of the Old Age Pensions Act, 1908, "If for the purpose of obtaining or continuing an old age pension under this Act, either for himself or for any other person . . . . any person knowingly makes any false statement or false representation" he commits an offence:—

Held, that an offence is committed only if the false statement is directly or indirectly relevant to the right to receive or continue to receive an old age pension.

A person, for the purpose of continuing an old age pension for himself, made a statement to a pension officer that he had not been in the workhouse since he first received an old age pension and that he was not disqualified for receiving or continuing to receive an old age pension. He had in fact come out of the workhouse on the preceding day:—

Held, that the false statement was directly relevant to the right of the person to continue to receive an old age pension, inasmuch as s. 6, sub-s. 4, of the Old Age Pensions Act, 1911, provides that

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the payment of a pension shall be discontinued where the disqualification has ceased less than three weeks before the time when the question is raised as to the disqualification of the person to receive an old age pension, and that therefore he had committed an offence under the statute.

SPECIAL CASE stated by a metropolitan police magistrate.

An information was preferred by the appellant, a pension officer, against the respondent under s. 9 of the Old Age Pensions Act, 1908, for having, on August 15, 1916, for the purpose of continuing an old age pension for himself, knowingly made a certain false representation, to wit, that he had never been in the workhouse since he first received his old age pension, and that he was not disqualified for receiving or continuing to receive an old age pension, which representation was false in the particulars that he had been in the workhouse since he first received his old age pension, and that he was disqualified for receiving or continuing to receive an old age pension.

Upon the hearing of the information on January 16, 1917, the following facts were admitted or proved: The respondent was an inmate of Greenwich workhouse from January 22, 1916, till February 14, 1916; from February 16, 1916, till May 2, 1916; from May 8, 1916, till August 14, 1916; from August 22, 1916, till November 7, 1916. On August 15, 1916, the respondent signed a document in the presence of the appellant after the contents of the document had been explained to him, and he had been informed by the appellant that it was a statement that his means were truly stated when his claim was decided in the first instance. That document contained the following statement by the respondent: "At the date when I first became entitled to receive my pension I fulfilled, and I still fulfil, the statutory conditions for the receipt of a pension, and I was not then, and am not now, disqualified for receiving or continuing to receive an old age pension." On the back of the document was a note stating that "a person is disqualified for the receipt of a pension in the following among other cases:— 1. While he is in receipt of poor relief (other than medical relief . . . .)." At the interview of August 15, 1916, the respondent also stated to the appellant that he had not been in the workhouse and was not in receipt of poor relief. On August 22, 1916, the

respondent received one weekly payment of 5*s*. under the Old Age Pensions Acts.

The magistrate dismissed the information, being of opinion that the offence stated in the information had not been proved; that the mere fact of the respondent having been in the workhouse or having received poor relief did not disqualify him in law or in practice from receiving the old age pension for a period during which he was no longer in the workhouse or in receipt of poor relief; that the respondent's untrue statement in regard to his not having been in the workhouse during periods antecedent to August, 1916, was not an offence under the Old Age Pensions Act, 1908; that in view of the fact of the respondent being old, infirm and deaf, and having regard to the time which had elapsed between the commission of the alleged offence and the hearing of the information, it was right and fair to insist on the charge preferred against him being clearly stated in the information and strictly proved at the hearing.

The magistrate added that in the event of his having considered it necessary to convict the respondent he should have required the respondent to enter into his own recognizance in the sum of 5*l*. to come up for conviction and sentence within twelve months under the Probation of Offenders Act, 1907 (7 Edw. 7, c. 17).

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination in point of law.

Giveen (*Sir Gordon Hewart, S.-G.*, with him), for the appellant. The magistrate was wrong in holding that an offence under s. 9 of the Old Age Pensions Act, 1908, could not be committed unless the false statement was one which would determine the right to a pension. The Act provides by s. 9 that if any person knowingly makes a false statement or representation for the purpose of obtaining or continuing an old age pension he commits an offence. By s. 3 a person is disqualified for continuing to receive an old age pension while he is in receipt of poor relief. A false statement may be very material although it does not directly affect the right of a person to a pension; for instance, suppose a man said he was born in

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Birmingham when in fact he was born in London, the statement would not directly affect the question whether the man was entitled to a pension, but it might be very material, because it might prevent inquiries being made so as to discover whether he was over seventy years of age, which is one of the necessary qualifications for receiving an old age pension. In the present case the statement made by the respondent was directly relevant on the question whether he was entitled to continue to receive an old age pension, because under s. 6, sub-s. 4, of the Old Age Pensions Act, 1911, he would not be entitled to a pension inasmuch as he had been in receipt of poor law relief within three weeks of making the statement, having come out of the workhouse on the preceding day.

The Respondent appeared in person.

DARLING J. I think this appeal must be allowed. The magistrate seems to have taken a wrong view with regard to the matter. I think it is plain that the false statement which the respondent made was material to the question whether he was entitled to continue to receive a pension. It is true that the question whether or not the man was entitled to a pension did not depend upon the truth of that statement; but for all that, the statement was material, as is shown by s. 6, sub-s. 4, of the Old Age Pensions Act, 1911, to which Mr. Giveen referred The mere fact that in the course of inquiries by a pension officer a question was put which was answered falsely would not, I think, of itself justify a conviction; it would be necessary to see whether the question was relevant to the inquiry which was being made, and was one which might have some effect upon the decision as to whether or not the person was entitled to receive a pension. In this case I think the question put was clearly a relevant question; it was not in itself a decisive question, but it was a question the answer to which would help to decide whether or not the man was entitled to receive or to continue to receive an old age pension, and therefore an offence against s. 9 of the Old Age Pensions Act, 1908, was, in my opinion, committed by the respondent and the appeal should be allowed.

The magistrate has said that had he convicted the respondent he would not have sent him to prison, but should only have bound him

over, and that appears to me to be a proper way of dealing with the case.

AVORY J. I am of the same opinion. The only question in the case is whether the representation made by the respondent that he had never been in the workhouse since he first received his old age pension was a false representation within the meaning of s. 9 of the Old Age Pensions Act, 1908. I think it is clear that it was a false representation within the meaning of that section. Sect. 7, sub-s. 1, of the Old Age Pensions Act, 1908, enacts that "All claims for old age pensions under this Act and all questions whether the statutory conditions are fulfilled in the case of any person claiming such a pension, or whether those conditions continue to be fulfilled in the case of a person in receipt of such a pension, or whether a person is disqualified for receiving or continuing to receive a pension, shall be considered and determined as follows: (*a*) Any such claim or question shall stand referred to the local pension committee, and the committee shall (except in the case of a question which has been originated by the pension officer and on which the committee have already received his report), before considering the claim or question, refer it for report and inquiry to the pension officer." The pension officer is then to inquire into and report upon the claim. Sect. 6, sub-s. 4, of the Act of 1911 expressly enacts that "Where a question is raised as to the disqualification of a person to receive an old age pension and it is alleged that the disqualification has arisen since the person has been in receipt of the pension, and that the disqualification is continuing at the time the question is raised, or, if it has ceased, has ceased less than three weeks before that time, the payment of the pension shall be discontinued." Now in the present case the disqualification of the respondent was continuing less than three weeks before the time when the representation was made, because less than three weeks before that time he was in the workhouse and in receipt of poor relief. It is obvious, therefore, that the statement that he had not been in the workhouse at any time since his old age pension was granted was in this particular case directly relevant. In my opinion, false statements which are either directly or indirectly relevant to the question whether a person is entitled to receive or continue to receive an old age pension are within the

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ambit of this section. It may be that statements which are altogether irrelevant and immaterial are not within it, but I am quite satisfied that any statement which is even indirectly relevant is within it.

SHEARMAN J. I am of the same opinion. I merely desire to repeat what Darling J. has said. I think that the false statement must be relevant to the question whether a person is entitled to receive or continue to receive an old age pension in order that an offence should be committed under the section. Sect. 7 of the Act of 1908 and sub-s. 4 of s. 6 of the Act of 1911 show that the false statement made by the respondent was relevant to the question whether he was entitled to continue to receive his pension. The appeal must therefore be allowed.

Appeal allowed.

Solicitor for appellant: *Solicitor for Customs and Excise.*

R. F. S.

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April 30; *May* 1.

BISS *v.* HYGATE.

Landlord and Tenant—Incomplete Agreement—Tenant let into Possession —Lease afterwards drawn up—Terms agreed to but Lease not signed— Retention of Possession after concluded Agreement—Part Performance —Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

The appellant on February 26, 1916, agreed to let, and the respondent agreed to take from the appellant, a nursery garden for six years from March 25, 1916, at 20*l.* a year payable quarterly, subject to the preparation of a formal lease. On the same day the appellant agreed to let the respondent into immediate possession, and the respondent went into possession and did such acts as digging, sowing seeds, and watering plants. On March 18 all the terms were agreed as embodied in a written lease, but it was not signed. After that date the respondent did no acts upon the land. On March 26 the respondent's wife died and he declined for that reason to go on with the matter. In an action by the appellant against the respondent for rent from March 25, the respondent pleaded the Statute of Frauds, and the appellant in answer set up part performance:—

Held, that although the respondent had gone into possession before the terms of the lease were agreed to, nevertheless, as his

possession continued until after the date fixed for the commencement of the tenancy and its continuance after that date was unequivocally referable to the contract, there was a sufficient part performance to take the case out of the Statute of Frauds, and the appellant was entitled to recover.

Hodson v. *Heuland* [1896] 2 Ch. 428 followed.

APPEAL from Bath County Court.

The appellant was the owner of a nursery garden and the respondent entered into negotiations with him for a lease thereof. On February 26, 1916, the parties arrived at an oral agreement that the rent was to be 20*l.* a year payable quarterly and that the tenancy was to commence on March 25 and was to be for six years from that date, but the other terms of the tenancy were not settled, and it was arranged that a lease was to be drawn up by the appellant's son. On the same day, February 26, 1916, the appellant agreed to give the respondent immediate possession in order that the respondent might be able to sow his seeds and do work on the plants, and the respondent went into possession and did such acts as digging, sowing seeds, and watering plants. On March 18 all the terms were agreed as embodied in a written lease, but it was not signed as the parties were under the impression that possibly it ought to be stamped before their signatures were attached to it. After March 18 the respondent did not do any acts upon the land. On March 26 the respondent's wife died and a fortnight later the respondent sent a message to the appellant that owing to his wife's death he did not see his way to continue "the negotiations." In the middle of May the respondent wrote to the appellant a letter definitely declining to go on with the matter. The appellant afterwards brought a county court action against the respondent to recover five quarters' rent from March 25, 1916. The respondent pleaded the Statute of Frauds, and the appellant in answer alleged that there was sufficient part performance to take the case out of the statute. The judge held that an act of part performance, in order to be sufficient, must be unequivocally referable, not merely to the contract, but to the title under the contract, and that as no acts of possession had been done by the respondent after March 18, there was no part performance sufficient to take the case out of the statute, and he dismissed the action.

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Foa, for the appellant. The parties arrived at a definite agreement on February 26, and immediately after that definite agreement the respondent went into possession. There was therefore a sufficient part performance of the agreement of February 26 to take the case out of the statute. It is true that on February 26 the subsidiary terms of the tenancy had not been settled, but as the rent, the length of the term, and the subject-matter had been agreed, that agreement of February 26, being followed by the taking of possession, could have been enforced by an action for specific performance, and the Court would, as regards the subsidiary terms, have decreed the usual terms: Fry on Specific Performance, 5th ed., par. 368.

Next, even if acts of possession done by the respondent before March 18, when all the terms were agreed, were not a sufficient part performance, yet his retention of possession after that date, or at all events after March 25, when the tenancy was to commence, was a sufficient part performance. Where possession has been given before an agreement has been arrived at and is retained after it has been arrived at, such retention of possession, if unequivocally referable to the contract, is a sufficient part performance: *Hodson* v. *Heuland* (1); *White* v. *Whitewood*. (2) Here the respondent's retention of possession after March 18 can only be referred to the agreement. [He also referred to *Miller* v. *Finlay*. (3)]

Wethered, for the respondent. An act cannot be a sufficient part performance to take a case out of the Statute of Frauds unless it is an act done by the party alleging part performance. The act of part performance on which the appellant must rely is not the respondent's being in possession but the appellant's own act in letting him into possession. There was no concluded agreement on February 26. The act of letting the respondent into possession before there was any concluded agreement could not be an act of part performance unequivocally referable to any agreement not concluded until a subsequent date. Until there was a concluded agreement the respondent was only a tenant at will. No acts of possession were done by the respondent on the land after March 18, when the concluded agreement was arrived at. Acts done before that date

(1) [1896] 2 Ch. 428. (2) (1897) 13 Times L. R. 409.
(3) (1861) 5 L. T. 510.

cannot be unequivocally referable to an agreement concluded on that date. All that happened after that date was that the seeds continued to grow. Equity would not have decreed specific performance of the incomplete agreement of February 26 on usual terms: *Winn* v. *Bull.* (1) An agreement which is subject to the preparation of a formal contract is not a contract. There were no acts of part performance referable to the title under the contract.

Foa was not called on to reply.

A. T. LAWRENCE J. The respondent took possession of this nursery garden on February 26, 1916, and his possession was merely that of a tenant at will up to March 25, the date fixed for the commencement of the tenancy. But his possession continued for at least a fortnight after March 25, and it does not seem to have been definitely determined till the middle of May. The question is what is the effect of the respondent's possession up to that time. It has been contended on his behalf that a possession taken while the parties are negotiating as to the terms of the proposed tenancy cannot be an act of part performance unequivocally referable to the agreement between them. I entirely agree with that contention. The doctrine of part performance applies only where the parties are agreed, and does not apply to mere negotiations. Therefore before March 18, when the agreement was arrived at, there was no part performance sufficient to take the case out of the statute. But after March 18, or at all events after March 25 when the tenancy was to commence, the possession which the respondent was still retaining was a possession unequivocally referable to the agreement at which the parties had arrived on March 18. There is no doubt that the acts of the respondent in sowing seeds and doing work in the garden amounted to possession, for he had the full benefit to be derived from the occupation of the premises, and he continued to grow his crops in the garden and to have that benefit and to be in possession until he gave notice to the appellant that he would not go on with the matter. If the appellant had gone on the premises after March 25 and before he received that notice he would have been liable in trespass, and during the whole of that period the respondent could have commenced an action for specific

(1) (1877) 7 Ch. D. 29.

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A. T. Lawrence J.

performance and could have obtained a decree. Therefore the respondent's retention of possession after March 25 was an act of part performance unequivocally referable to the agreement. The respondent has admitted that it was the death of his wife that caused him to change his mind. His wife did not die till March 26, and therefore he has admitted that up to that time he was in possession under the agreement with the intention of affirming it. There was therefore no evidence on which the judge could find either that the respondent was not in possession under the agreement or that there was no part performance of the agreement. Consequently the appeal must be allowed and judgment entered for the appellant.

AVORY J. I am of the same opinion. It is not necessary to express any opinion as to whether the respondent's possession between February 26 and March 18 amounted to part performance of the agreement arrived at on February 26, because it is clear that the possession of the respondent after March 18 or March 25 was a part performance of the contract made on March 18 for a lease to commence on March 25. The case of *Hodson* v. *Heuland* (1) is a conclusive authority on this point. The decision in that case was that although the entering into possession was antecedent to the contract, yet the continuing in possession after the contract being unequivocally referable to the contract, was a sufficient part performance. That case is referred to as an authority in art. 602 of Fry on Specific Performance, 5th ed., where the learned author says: "Continuance in possession may, if unequivocally referable to the contract alleged, be a sufficient act of part performance, although the taking of possession was antecedent to the contract."

No distinction can be drawn between an act unequivocally referable to the contract and an act unequivocally referable to the title under the contract. The act of the respondent in continuing in possession after March 25 was unequivocally referable to the contract of March 18. As was said by Kekewich J. in *Hodson* v. *Heuland* (2), "it must have relation to the one agreement relied upon, and to no other. It must be such . . . . as could be done with no other view or design than to perform that agreement. It

(1) [1896] 2 Ch. 428. (2) Ibid. 433.

must be sufficient of itself, and without any other information or evidence, to satisfy a Court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced." I cannot see how any other inference can be drawn than that the respondent was in possession under and in pursuance of the contract which he had made on March 18. For those reasons I agree that the appeal should be allowed.

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AVORY J.

Appeal allowed.

Solicitors for plaintiff: *Church, Adams, Prior & Balmer, for Arthur E. Withy, Bath.*

Solicitors for defendants: *Rossiter & Odell, for Titley, Long & Lavington, Bath.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.

1918

April 16, 17; *May* 2.

THE KING *v.* BRAITHWAITE AND OTHERS.

Local Government—General District Rate—Summons for Non-payment of Rate—How Service of Summons to be effected—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 256, 267—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 1.

By s. 256 of the Public Health Act, 1875, "If any person assessed to any rate made under this Act by any urban authority fails to pay the same when due . . . . any justice may summon the defaulter to appear before a Court of summary jurisdiction to show cause why the rate in arrear should not be paid."

By s. 267, "Notices orders and any other documents required or authorised to be served under this Act may be served by delivering the same to or at the residence of the person to whom they are respectively addressed."

By s. 1 of the Summary Jurisdiction Act, 1848, "Every such summons"—that is to say, every summons issued by a justice under that Act—"shall be served . . . . upon the person to whom it is so directed, by delivering the same to the party personally, or by leaving the same with some person for him at his last or most usual place of abode":—

Held by the Court of Appeal, affirming the decision of the Divisional Court [1918] 1 K. B. 1:

(1.) That a summons for non-payment of a general district rate

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is an "other document" within the meaning of s. 267 of the Public Health Act, 1875;

(2.) That for the purposes of the service of such a summons the ratepayer's place of business is to be treated as his "residence" within the meaning of that section, although he does not sleep there; and

(3.) That service of such a summons at his place of business under that section will be good, notwithstanding the provisions of s. 256 of that Act and of s. 1 of the Summary Jurisdiction Act, 1848, under the latter of which it has been held that a man's place of business at which he does not sleep is not his "place of abode."

Reg. v. *Mead* [1894] 2 Q. B. 124, *Mason* v. *Bibby* (1864) 2 H. & C 881, and *Newport Corporation* v. *Lang* (1892) 57 J. P. 199 followed.

APPEAL from the decision of a Divisional Court (Darling, Avory, and Sankey JJ.) (1) discharging a rule nisi for a certiorari to quash an order of justices for payment of a general district rate.

The appellant, Major Dowling, was before the war in practice as a solicitor in Bishop Auckland, where he owned two adjoining houses, one of which he used as his dwelling-house and the other as his office. The two houses had no internal communication, and were separately rated. In April, 1915, the appellant, who had then joined His Majesty's Forces, closed the dwelling-house, leaving it, except for the furniture, wholly unoccupied, but his clerk continued to carry on his business in the adjoining house. In October, 1916, a general district rate was made by the Bishop Auckland Urban District Council for the half-year ending March 31, 1917, to which rate the appellant was assessed in respect of his dwelling-house in the sum of 2*l.* 8*s.* 9*d.*, and that sum was duly demanded of him. The appellant refused to pay the rate. He knew that he was legally liable to pay it, but thought that he ought not to be required to do so as long as he was serving with His Majesty's Forces. On February 20, 1917, a summons was issued for non-payment of the rate, and Major Dowling, being then in France, and his dwelling-house being unoccupied, the summons was served by a constable leaving it at his office with a Mr. Graham, who was his managing clerk. Mr. Graham wrote to inform Major Dowling of the summons, but the letter did not reach him until after the return day, and as he did not appear the justices made an order in his absence for payment of the rate. Major Dowling then obtained a rule for a certiorari

(1) [1918] 1 K. B. 1.

to bring up that order as having been made without jurisdiction on the ground that the service of the summons was insufficient, it having been served at his place of business instead of at his place of abode.

On October 22, 1917, the Divisional Court discharged the rule. (1)

Major Dowling appealed.

Simey, for the appellant. The summons should have been served by leaving it at Major Dowling's dwelling-house as soon as some person could be found on the premises with whom to leave it.

By s. 256 of the Public Health Act, 1875, where a person fails to pay a general district rate when due a justice "may summon the defaulter to appear before a court of summary jurisdiction," and in that section the words "may summon" must mean in the usual manner in which a person is summoned before a Court of summary jurisdiction, that is, in the manner provided for by s. 1 of the Summary Jurisdiction Act, 1848. If the summons was issued under s. 6 of the Summary Jurisdiction Act, 1879, for recovery of the amount as a civil debt recoverable summarily, the person would be summoned in the same manner under s. 1 of the Act of 1848.

Sect. 1 of the Act of 1848 provides that every such summons shall be served upon the person to whom it is directed by delivering it to him personally or by leaving it with some person for him at his last or most usual "place of abode." As there used that expression means a place of residence, and not a place of business. That is its natural meaning apart from authority. In the Oxford English Dictionary the definitions of the term "abode" when used in the sense now in question are: "4. Habitual residence, dwelling . . . . 5. An abiding place, a dwelling-place, place of ordinary habitation; house or home. . . . ." There is also conclusive authority upon the point. In *Rex* v. *Lilley* (2) it was held that service of a summons under the Act of 1848 for an offence against the Sale of Food and Drugs Act was bad by reason of the summons being left at the defendant's shop instead of at the place where he lived. That case was followed in *Rex* v. *Rhodes* (3), where the summons was for an

(1) [1918] 1 K. B. 1. (2) (1910) 104 L. T. 77.
(3) (1915) 113 L. T. 1007.

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offence under the Cinematograph Act. In *Reg.* v. *Hammond* (1) it was held that a statutory provision, which required that the election of councillors should be by voting papers containing the names and places of abode of the persons voted for, was not complied with by a voting paper which gave the place of business of the candidate, even though he was well known there. The case of *Roberts* v. *Williams* (2) is distinguishable, because the requirement of the statute there in question that the attorney's "place of abode" should be given was with the object of insuring that the place where he was to be found as an attorney should be given, and that was complied with by giving his place of business. Sect. 267 of the Act of 1875 has no application. The term "notices" as generally understood does not include a summons, and as used in that section it is not necessary to construe it as including a summons in order to render it operative, because there are many sections in the Act requiring notices to be given, as, for example, ss. 46, 62, 68, and 257. As to the term "orders," it may be doubted whether as used in that section it has any meaning at all, because, while various sections of the Act give power to make orders, as, for example, ss. 62 and 96, there is no provision in the Act for service of an order. The words "other documents" in s. 267 mean documents ejusdem generis with notices and orders and therefore do not include a summons. The case of *Reg.* v. *Mead* (3), in which it was held that a summons came within these words in the corresponding section of a later Act, is distinguishable, for there the summons in question was a process in rem in respect of a nuisance, and not a process in personam, and the Court guarded itself against deciding that a summons in personam could be served under that section. If that case is not distinguishable, it was wrongly decided and should not be followed. If s. 267 does apply to the summons in question it only provides that it may be served "at the residence" of the person to whom it is addressed. As there used that expression refers to a place of residence and not to a place of business. In the Oxford English Dictionary the definition of "residence" when used in this sense is: "5. The place where one resides; one's dwelling-place; the abode of a person. . . . . (*b.*) A dwelling, abode, house . . . ."

(1) (1852) 21 L. J. (Q.B.) 153. (2) (1835) 2 C. M. & R. 561.
(3) [1894] 2 Q. B. 124.

The cases of *Mason* v. *Bibby* (1) and *Newport Corporation* v. *Lang* (2) do not support the view that for the purpose of service of a summons under the Public Health Act a man's place of business is his abode. In the former of these cases the document was not a summons but a notice, in the latter it was not a summons but a demand note, and in both cases the ratio decidendi was that the document in question might be served in any way that would cause it to reach the person to whom it was addressed, the observations in these cases as to the place of business being a place of abode or residence being mere obiter dicta. In the latter of these cases the defendant was a business firm whose place of business might not improperly be described as its "residence."

F. Barrett-Lennard (*G. F. Mortimer* with him), for the respondents. The service of the summons for payment of the rate by the appellant was sufficient and valid. First, even if on the true construction of s. 256 of the Public Health Act, 1875, the summons had to be served in the manner provided by the Summary Jurisdiction Act, 1848, s. 1, it was duly served at the appellant's "place of abode" within the meaning of the latter section by being left at his office. There is no substantial distinction between the expressions "place of abode" and "residence," and this is virtually admitted by the appellant. The expression "place of abode" or "residence" may have different meanings in different Acts, its meaning in each Act depending upon the purposes of the Act and the context in which the expression is used. In one case it may mean the place where a man sleeps, or where his family dwells; in another it may mean the place where his business is carried on. In an Act such as the Summary Jurisdiction Act, 1848, the expression "place of abode" would include his place of business as being the place where he is most likely to be heard of for the purposes of the Act: *Roberts* v. *Williams* (3); per Lord Campbell, C.J. in *Reg.* v. *Hammond* (4); *Blackwell* v. *England.* (5) There being no essential distinction between the terms "abode" and "residence," the cases of *Mason* v. *Bibby* (1), and *Newport Corporation* v. *Lang* (2), which decide that for the purposes of the service of a summons a man's place of

(1) 2 H. & C. 881.
(2) 57 J. P. 199.
(3) 2 C. M. & R. 561.
(4) 21 L. J. (Q.B.) 153.
(5) (1857) 8 E. & B. 541.

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business may be his " residence " within the meaning of the Public Health Act, are equally conclusive authorities to show that for these purposes his place of business may be his " place of abode " within the meaning of the Summary Jurisdiction Act, 1848. The cases of *Rex* v. *Rhodes* (1) and *Rex* v. *Lilley* (2) were wrongly decided and should be overruled. Secondly, the summons had to be served in the manner provided by the Public Health Act, 1875, and was properly served in that manner. That Act by s. 256 expressly provides that on non-payment of a rate under the Act the procedure is to be by summons, which involves the service of the summons. A summons under that section must therefore be included in the words " other documents " in s. 267 ; and it has been so decided in *Reg.* v. *Mead.* (3) The summons was duly served at the " residence " of the appellant within the meaning of s. 267 by being left at his place of business, as appears from the authorities already cited.

May 2. The following judgments were read :—

PICKFORD L.J. The appellant in this case is by profession a solicitor and is now on active service with His Majesty's Forces. He is the occupier of two adjacent houses, in one of which he lived and in the other he carried on his profession. They had no internal communication and were separately rated. When the appellant joined His Majesty's Forces he closed the dwelling-house, leaving it unoccupied except for his furniture. His clerk still continued to carry on his business in the adjoining house. The appellant after joining His Majesty's Forces refused to pay his rates, not because he was not legally liable, but because he thought persons so serving ought not to be required to pay rates. It is enough to say that there is no legal exemption in such a case.

As the rates were not paid after demand a summons was issued for non-payment, and as the appellant was in France and the dwelling-house shut up the summons was served by leaving it with the appellant's clerk at the office. The clerk wrote to the appellant to inform him of the summons, but the letter did not reach him till after the return day. The justices adjourned the hearing for

(1) 113 L. T. 1007. (2) 104 L. T. 77.
(3) [1894] 2 Q. B. 124.

a time, and on the adjourned hearing, as the appellant did not appear, they made an order for payment.

The appellant then applied for a certiorari to bring up that order on the ground that there had been no valid service of the summons, his contention being that service should have been made under the provisions of the Summary Jurisdiction Act, 1848, and that service under that Act must be either personal or at his place of abode, and not at his place of business.

The respondents contended that service of this summons was made under the Public Health Act, 1875, s. 267, and that under that Act service at a place of business was good, such place of business being a place of residence within the meaning of that section. Speaking for myself in the absence of authority, I should have thought that the same meaning attached to place of abode and place of residence; but there are authorities to the contrary—*Rex* v. *Lilley* (1) and *Rex* v. *Rhodes* (2) on the one side, and *Mason* v. *Bibby* (3) and *Newport Corporation* v. *Lang* (4) on the other. If it should become necessary to decide whether there is any difference in the meanings of the two expressions, I wish to reserve my opinion.

Speaking again for myself, I should have thought, in the absence of authority, that the meaning of both expressions was the place where a man lived using that word in its ordinary sense as distinguished from the place where he carried on his business. But there is authority of long standing that such a meaning is not always to be attached to the expression "place of residence," but that the object of the provision in which it is used must be regarded: see *Blackwell* v. *England* (5), where it was held that to describe an attorney's clerk as residing at the place of business was sufficient because the object of the description was to enable persons to make inquiries about him, and that object was better attained by giving his place of business than his lodgings. There are other authorities to the same effect that the words are to be interpreted according to the intention of the provision containing them, and the cases of *Mason* v. *Bibby* (3) and *Newport Corporation* v. *Lang* (4), before mentioned, decided

(1) 104 L. T. 77.
(2) 113 L. T. 1007.
(3) 2 H. & C. 881.
(4) 57 J. P. 199.
(5) 8 E. & B. 541.

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Pickford L.J.

that for the purpose of service under the Public Health Act, 1875, place of residence includes place of business. The object of prescribing the place at which service is to be made is that the person summoned should have notice of the summons, and this is as well, or better, attained by service at his place of business than at his house. These authorities are of old standing and have no doubt regulated the practice in many instances, and in such a case, unless there is a clear violation of principle or a great injustice resulting, I do not think we should overrule them. If, therefore, the service of the summons was under the Public Health Act, 1875, the cases cited show that it was good.

Whether it was under that Act or not depends upon whether the summons is a document within s. 267. Here again there is a decision of nearly twenty-five years' standing in *Reg.* v. *Mead* (1), which has probably regulated the practice ever since. That case decides that such a summons is a document within the corresponding section of the Public Health (London) Act, 1891, in which the provisions are for this purpose identical with the provisions of the Public Health Act, 1875, and therefore to be served under its provisions. It is true that in that case the summons was one to an unknown and unnamed owner of premises and could not have been served at all unless it were served in that way, but both the learned judges, Charles and Collins JJ., state broadly that a summons is within the section and to be served in accordance with its provisions. I do not think we should overrule this decision unless it is clearly wrong, and I do not think it is. The order of the justices, as it seems to me, would fall within s. 267 so far as service is concerned, and I see no reason why document should not include the summons upon which the order is made. It seems to me to fall within the words "documents required or authorised to be served under this Act," and s. 256 authorizes a justice to summon a defaulter in payment of rates, and this summons, therefore, is authorized by the Public Health Act, 1875, s. 256, to be served. The result is that I think the service was good, and the appeal should be dismissed with costs.

WARRINGTON L.J. The appellant Major Dowling, asks to bring up to be quashed an order of justices dated April 2, 1916, for payment

(1) [1894] 2 Q. B. 124.

by him of 2*l.* 14*s.* 8*d.* for general district and water rates in respect of a dwelling-house of which he is the occupier and for the costs. He contends that the summons on which the order was made was not duly served and therefore the justices had no jurisdiction.

Warrington L.J.

Major Dowling is a solicitor by profession ; he occupied before he joined the Army shortly after the outbreak of war two houses adjoining but with no internal communication. One he used as his dwelling-house ; in the other he had his offices as a solicitor. On joining the Army in 1915 Major Dowling shut up his dwelling-house, leaving his furniture there. The office remained open and the business was carried on, on Major Dowling's behalf, by his managing clerk. He refused to pay rates for his dwelling-house—although he admitted they were due, inasmuch as the furniture remained there—thinking that they ought not to be enforced against one who was deprived of the use of his house by serving the country. The local authority did not take this view, and after serving the necessary demand they procured the justices to summon him before them pursuant to s. 256 of the Public Health Act, 1875. The summons was served by being left with the managing clerk at Major Dowling's office. He himself was absent in France, and, although the clerk wrote to tell him of the summons, he did not receive the letter until after the return day, March 5, 1917. On that day the justices adjourned the summons for a month, and on the adjourned hearing made the order in question, Major Dowling not appearing.

Major Dowling insists that the summons, being process under the Summary Jurisdiction Acts, can be effectually served only in the manner prescribed by s. 1 of the Summary Jurisdiction Act, 1848, that is to say, either personally or by leaving the same with some person for him at his last or most usual place of abode, and that it has been decided under this Act that the place of business is not a place of abode : see *Rex* v. *Lilley* (1) ; *Rex* v. *Rhodes*. (2) The justices, on the other hand, contend that the summons is a document required or authorized to be served under the Public Health Act, 1875, and may therefore be effectually served in manner prescribed by s. 267 of that Act, which allows service at the residence

(1) 104 L. T. 77. (2) 113 L. T. 1007.

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of the respondent, and that it has been decided that for the purpose of the Public Health Act service at the place of business is good service : see *Mason* v. *Bibby* (1) and *Newport Corporation* v. *Lang.* (2) The Divisional Court have accepted this view, and Major Dowling appeals.

Warrington L.J. I agree with the Divisional Court that the mode of service is regulated by s. 267 of the Public Health Act, 1875. The words are "any . . . . documents required or authorized to be served under this Act"—not any document which by the Act is so required or authorized. It is therefore unnecessary to find in the Act any express direction that this summons is to be served. All we do find is in s. 256 that any justice may summon the defaulter to appear before a Court of summary jurisdiction. This necessarily involves service of a summons so to appear, and in my judgment such summons is required or authorized to be served under the Act and is therefore within s. 267. The point was decided in this way in *Reg.* v. *Mead* (3) by Charles and Collins JJ., and the correctness of that decision appears never to have been questioned.

Then can it be served at the place of business ? Independently of authority, I should say Yes. Such an expression as residence, which has no technical meaning, may properly be construed having regard to the objects of the Act in which it is found : see *Blackwell* v. *England* (4), a case under the Bills of Sale Act. The only possible object in the case of the statute in question is that the documents mentioned may be brought to the knowledge of the defaulter. For this purpose I can see no reason why a man's private house or lodgings should be selected as the place of service exclusively of his place of business. In fact, seeing that the section authorizes service by post, I should say there was much more chance of the documents getting by accident into the fire or the waste-paper basket at the private house or lodging than at his business premises where part of the routine of the day is to open and read all letters. But this point also is covered by the authority of *Mason* v. *Bibby* (1) and *Newport Corporation* v. *Lang.* (2)

Both on principle and on authority also, therefore, I am of opinion that this appeal fails and should be dismissed.

(1) 2 H. & C. 881.
(2) 57 J. P. 199.
(3) [1894] 2 Q. B. 124.
(4) 8 E. & B. 541.

SCRUTTON L.J. The question raised in this appeal is whether a summons for payment of water rate and general district rate in respect of his dwelling-house was properly served on the appellant. It was served by being left with a clerk at his place of business.

If service is to be regulated by the Summary Jurisdiction Acts the summons may be served by leaving it with some person for him at his last or most usual "place of abode," and there are decisions under this Act that his place of business is not his "place of abode."

If service is to be regulated by the Public Health Act, s. 267, the summons may be served by delivering the same to some person at his "residence," and there are authorities under this section, which the Divisional Court has followed, that his place of business may be his "residence."

Whether service of the summons which by s. 256 of the Public Health Act is to be issued by a justice for appearance before a Court of summary jurisdiction may be effected under s. 267 of that Act depends on whether the summons is, under that section, a "document required or authorised to be served under this Act." The Divisional Court have followed *Reg.* v. *Mead* (1), a decision of Charles and Collins JJ. that under s. 128 of the Public Health (London) Act, 1891, the words of which are practically identical with those of s. 267 of the Public Health Act, 1875, a summons to appear before a Court of Summary Jurisdiction to answer a complaint under the Public Health (London) Act was a "document required or authorised to be served under this Act," so that the method of service under s. 128 applied. This decision is based partly on the fact that the summons was on an unknown owner of premises, and that if this mode of service was not available there was no mode of service provided under the Summary Jurisdiction Acts, so that there was no means of dealing with a nuisance on premises whose owner was unknown, But Charles J. said: "I cannot see that there is any reason for not construing s. 128 as including a summons as well as a notice or order"; and Collins J. said: "I am clearly of opinion that those words do embrace a summons." It was argued that the words "other documents" must be construed as ejusdem generis with the words "notices, orders," and it was said that this consideration would exclude legal proceedings.

(1) [1894] 2 Q. B. 124- 132, 133.

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But the section deals with the "orders . . . . required or authorised to be served under this Act." This would cover orders of Courts, such as the "order of abatement or prohibition" mentioned in s. 102 and the preceding sections, and if so, there is no difference of kind effected in including the summons on which such orders are made. The demand to pay rates which precedes the issue of the summons in question in this case may clearly be served according to the provisions of s. 267, and it would be curious if a different mode of service were necessary for the consequent summons. The case of *Reg.* v. *Mead* (1) has stood unchallenged for twenty-five years, and in these matters of procedure, if no obvious injustice is done by a rule, it is of great importance that the rule should be certain and not varied according to the Courts' view from time to time on the construction of words which are somewhat ambiguous. I am not satisfied that the decision in *Reg.* v. *Mead* (1) was wrong; I am inclined to think it was right; and, anyhow, I do not see any reason for changing the present practice by overruling it. In my opinion, therefore, the validity of the service of this summons should be regulated by s. 267 of the Public Health Act.

Under that section, was it validly served? It was served on a clerk in charge at the appellant's place of business, and the section requires it to be served "at the residence of the person" summoned. This sort of question has had to be considered on a number of statutes passed for varying purposes, some using the words "place of abode," some "place of residence;" and on them there have been a bewildering variety of decisions as to whether a place of business is or is not a place of abode or residence. A picturesque dictum of Martin B. in one of the authorities describes the process of going through these authorities as "wallowing in the mire," and I do not propose to undertake that task.

In ordinary language, I do not think one would speak of a place of business as a man's place of abode or residence—phrases which, I think, ordinarily mean the same thing; but when the words are used in a statute one must consider the purpose of the statute and the object to be effected by requiring the place of abode or residence to be described or visited. Thus in the Bills of Sale Act the place of business may be inscribed in the bill of sale as the "residence"

(1) [1894] 2 Q. B. 124, 132, 133.

of the grantor or attesting witness, for, as Pollock C.B. said in *Attenborough* v. *Thompson* (1), "The object of the Act was, that information should be given where the person might be found, met with, seen and inquired of. . . . . Our decision is, that the place of business being a place where the party 'abides' for a considerable portion of his time, is quite sufficient as a description of the place of residence, not that the other description" (i.e., where he sleeps) "of it might not be also sufficient." [See also the decisions of *Blackwell* v. *England* (2), especially the judgment of Erle J., and *Ablett* v. *Basham* (3), the latter on the description of the plaintiff's residence on a writ of summons.] So in *Haslope* v. *Thorne* (4) the "place of abode" of a deponent to an affidavit was held to cover his place of business. Lord Ellenborough said: "The words 'place of abode' did not necessarily mean the place where the deponent sleeps; the object of the rule of Court was to ascertain the place where the deponent was most usually to be found, which in the present case was the office at which he was employed during the greater part of the day, and not the place whither he retired merely for the purposes of rest." The decision of *Stoy* v. *Rees* (5) as to writs is the other way.

On the other hand, where, for a municipal election, the place of abode of a candidate had to be stated, the Court held in *Reg.* v. *Hammond* (6), that the word was to be used in its ordinary sense of residence as contrasted with business, and there are similar decisions as to service under the Summary Jurisdiction Act: *Rex* v. *Lilley* (7), by Ridley J., Pickford J. expressed no opinion; *Rex* v. *Rhodes* (8), following *Rex* v. *Lilley*. (7)

What, then, is the purpose of the provision by which a summons need not be personally served, but may be left at the "place of residence"? Obviously that it shall get to the person summoned by being left at a place where it is likely to reach him. His place of business will usually be at least as suitable a place for that purpose as the place where he sleeps; frequently more so, as more care is

(1) (1857) 27 L. J. (Ex.) 23, 24 (fuller than the report in 2 H. & N. 559).
(2) 8 E. & B. 541.
(3) (1856) 5 E. & B. 1019.
(4) (1813) 1 M. & S. 103.
(5) (1890) 24 Q. B. D. 748.
(6) 21 L. J. (Q.B.) 153.
(7) 104 L. T. 77.
(8) 113 L. T. 1007.

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usually taken of business than of private documents. On principle, therefore, I see no reason why the place of business should not be the place of residence for the purposes of serving this summons; and there are two decisions under these Acts to this effect which the Divisional Court has followed—*Mason* v. *Bibby* (1) and *Newport Corporation* v. *Lang*. (2) As on principle I am of opinion that the purpose of this legislation is furthered by such a construction, and, as already stated, think it is undesirable to disturb an existing rule of procedure unless it really causes injustice, I am not disposed to overrule these authorities, or reverse the decision of the Divisional Court, which is based on them.

I may add that, while the true construction of the Summary Jurisdiction Act provision as to service is not before us, I think it is unfortunate that in Acts with a similar purpose and similar words there should be different decisions as to their meaning, and I desire to reserve liberty to consider whether the principles I have endeavoured to state should not also be extended to the Summary Jurisdiction Acts so as to allow service by leaving the summons at a place of business.

In this particular case I am clear no injustice is done. The appellant's English dwelling-house was closed, but he had clerks at his place of business. He had conceived the idea that while he was serving in the Army he should not pay rates, and for some time had paid no attention to any claims for rates of any sort. If he was personally served he did not appear and distresses had to be levied on his property. He would not have appeared if personally served in this case. It is a pity he has not spent the money expended on these proceedings in paying his rates.

The appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *J. & C. Dodd, for J. Dowling, Bishop Auckland.*

Solicitors for respondents: *Corbin, Greener & Cook, for J. T. Proud & Son, Bishop Auckland.*

(1) 2 H. & C. 881. (2) 57 J. P. 199.

W. J. B.

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May 1, 2.

Trespass—Sheep developing Scab—Police Notice interning Sheep—Scienter—Novus actus interveniens—Liability of Defendant for Damages—Remoteness—Sheep-scab Order, 1905—*Diseases of Animals Act*, 1894 (57 & 58 *Vict. c.* 57), *ss.* 4, 10.

The defendant's sheep trespassed on the plaintiff's land, where in the course of a few days they developed scab, in consequence of which they were interned in a circumscribed area on the plaintiff's land under a notice of detention given under the Sheep-scab Order, 1905, made in pursuance of the Diseases of Animals Act, 1894, the notice extending also to sheep belonging to the plaintiff which had been in contact with the trespassing sheep. In an action by the plaintiff to recover damages for the trespass the county court judge nonsuited the plaintiff on the ground that there was no allegation or proof that the defendant was aware of the condition of his sheep at the date of the trespass :—

Held, that the doctrine of scienter had no application to an action founded on trespass and that the plaintiff was entitled to recover all such damages as were the natural consequence of the presence of the defendant's sheep on his land as well after as before the date of the notice of detention

Cooke v. *Waring* (1863) 2 H. & C. 332 distinguished.

Appeal from Worcester County Court.

The defendant's sheep trespassed on the plaintiff's land, where, in the course of a few days, they developed scab, and in consequence were detained in a barn and meadow on the plaintiff's land under a notice of detention dated February 28, 1917, given by the inspector of the local authority of the county of Worcester under the Sheep-scab Order, 1905, art. 2, made by the Board of Agriculture in pursuance of the Diseases of Animals Act, 1894, s. 10. The notice, which was not withdrawn until May 19, 1917, extended to some of the plaintiff's own sheep which had been in contact with the trespassing sheep. The plaintiff claimed damages for trespass, the particulars of which, in addition to keep of sheep, included items for depreciation of plaintiff's cattle, loss of profits, extra feeding, labour for dipping sheep, loss of time, and extra labour, amounting in all to 57*l.* 2*s.* 5*d.* The defendant paid 15*l.* into Court, with a denial of liability. The plaintiff neither alleged nor proved that the

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defendant was aware of the condition of his sheep at the date of the trespass, and on this ground the county court judge nonsuited the plaintiff, holding that in order to maintain the claim it was necessary for the plaintiff to prove scienter on the part of the defendant. The plaintiff appealed. On the hearing of the appeal it was not disputed that the defendant was liable in damages for the trespass for the few days which elapsed prior to the notification of the disease, but it was contended that he was not liable in law for any damage subsequently incurred.

Hon. A. R. Coventry, for the appellant. The county court judge based his judgment on *Cooke* v. *Waring* (1), but the action in that case was founded on negligence, and not on trespass. In an action founded on trespass it is unnecessary to prove scienter for the purpose of recovering damages which are the natural consequences of the trespass: *Lee* v. *Riley* (2); *Cox* v. *Burbidge* (3); *Bradley* v. *Wallaces* (4), per Cozens-Hardy M.R. The only question is whether the damage is too remote. The plaintiff therefore is entitled to recover all such damages as were the direct consequences of the trespass whether incurred before or after the notice of detention.

V. Graham Milward, for the respondent. It is true that to maintain an action of trespass scienter is unnecessary, but on the question of damages it is vital. The detention of the defendant's sheep on the plaintiff's land after the discovery of scab was not an ordinary consequence flowing from the trespass, and in the absence of scienter on the part of the defendant such damages are irrecoverable: *Cox* v. *Burbidge* (3); *Bradley* v. *Wallaces.* (4) The defendant was prevented from removing his sheep by the act of a third party for which he is not responsible at law.

Hon. A. R. Coventry in reply. The notice of detention was not in the nature of a novus actus interveniens relieving the defendant from further responsibility: *Scott* v. *Shepherd* (5); *Clark* v. *Chambers.* (6) If the notice was wrongly given the law provides means by which the defendant could recover compensation from the local authority. If, contrary to my contention, scienter is of

(1) 2 H. & C. 332.
(2) (1865) 18 C. B. (N.S.) 722.
(3) (1863) 13 C. B. (N.S.) 430.
(4) [1913] 3 K. B. 629, 633.
(5) (1773) 2 W. Bl. 892.
(6) (1878) 3 Q. B. D. 327.

any importance in the present case, the defendant, if he had used proper care, would have known the condition of his sheep at the time of the trespass and is in the same position as if he had known: *White* v. *Steadman*. (1) [He also cited *Blyth* v. *Birmingham Waterworks Co.* (2) and Beven on Negligence, 3rd ed., vol. 1, p. 392.]

A. T. LAWRENCE J. stated the nature of the appeal and continued: It is now admitted on the part of the defendant that a portion of the damage claimed is recoverable, namely, that which was the direct consequence of the trespass for the few days prior to the notice of detention, but it is contended that the defendant is not liable for any subsequent damage because the detention of the sheep upon the plaintiff's land after that time was due to a notice of detention purporting to be made under the Sheep-scab Order, 1905, art. 2. That was a notice given pursuant to the Diseases of Animals Act, 1894, s. 10, and, so far as we have been informed, was a legal notice duly given, and we proceed on that assumption for the purpose of our present decision. As the result of that notice the defendant's sheep were confined or interned upon the plaintiff's land for a considerable period of time, and the plaintiff brings this action in respect of the damage which he alleges was caused to him by their presence on the land. Mr. Coventry has limited his claim to damage consequent upon the presence of the defendant's sheep on the plaintiff's land, that is to say, directly consequent in the sense that they consumed the plaintiff's food, and thereby caused him to have less food for his own animals and caused damage to the plaintiff accordingly. The county court judge has held that none of these damages can be recovered. Mr. Milward, on behalf of the defendant, has relied on the fact that no scienter was alleged or proved, that is to say, there was no knowledge shown on the part of the defendant that these sheep were in a diseased condition before they strayed on to the plaintiff's land. Mr. Coventry's reply to that has been that scienter has nothing to do with the case; he relies on the trespass, and in my opinion he is right in so doing if he can make good the proposition that the damage which the plaintiff suffered was the natural consequence of the trespass, and I think he has succeeded in establishing that proposition. Mr. Milward has relied

(1) [1913] 3 K. B. 340. (2) (1856) 11 Ex. 781.

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upon a class of cases in which it has been held that scienter is necessary to render the owner liable for the acts of a domestic animal which turns out to be vicious or does some act indicating inherent vice. That is perfectly true. Scienter is necessary in that case, because a domestic animal does not naturally behave in that way. An ordinary domestic animal, such as a horse, cow, or sheep, does not attack human beings or even other animals except under certain circumstances, and therefore it is necessary to prove that the owner was aware of the exceptional disposition of his animal; whereas in the case of a wild beast there is no necessity to prove a scienter, because it is in the nature of such an animal to attack. That is the well recognized distinction, but to apply the doctrine of scienter to this case is in my opinion erroneous. This is a case of disease, and all animal life has its peculiar diseases to which it is subject in the course of nature. Scab is one of those diseases in the case of sheep, and every owner of sheep must be aware that his sheep are liable to develop scab, which is due to some parasite upon the sheep; but how it is caused we have not been informed, and we have been furnished with no evidence on the subject or as to the period of incubation necessary for its development, though I should think the probability is that these sheep had the disease in them before they left the defendant's land; but, whether that is so or not, it seems to me to be quite within the ordinary course of nature that an animal may develop disease, and that anything which follows as a natural consequence and may reasonably be foreseen as a possible consequence is recoverable as damages. On the discovery of the disease in the sheep while on the plaintiff's land it became the duty of the officials charged with that matter in the district to intern them, and they did so. That, again, was a natural consequence of the develpment of the disease, for which the defendant is equally liable. It is impossible for the defendant to say that though his sheep have wrongfully come on to the plaintiff's land, because there is a notice from a lawful authority preventing him from taking them away, therefore the plaintiff must maintain them at his own expense for whatever period the authorities require them to be interned upon the plaintiff's land. In my judgment the defendant must compensate the plaintiff for the expense he has incurred in maintaining the defendant's sheep

upon his land, and must also compensate him for the damage directly caused to the plaintiff's sheep by the presence of the defendant's sheep under this detention notice. The assessment of those damages is a question of fact for the county court judge to investigate and determine. It is only such damages as were actually suffered that the plaintiff is entitled to recover. He is not necessarily entitled to recover under some of the headings which I see in the particulars, such as "depreciation of cattle." These matters are questions of fact to which the judge must direct his mind, but I am not prepared to say that if as a direct consequence of the notice of detention the value of the plaintiff's animals in the market was depreciated, that is not a subject-matter for compensation by the judge if he believes it to be the case. My learned brother will refer in his judgment to an old case of *Anderson* v. *Buckton* (1) which has a bearing on this point, but upon general principles I think the plaintiff is entitled to recover within the limits I have referred to, and the case must go back to the learned county court judge to be heard upon its merits for him to apply the principles which I have attempted to lay down.

AVORY J. At the outset of the argument in this case I thought that the only question to be determined upon this appeal was whether the plaintiff had any cause of action in this case at all, and certainly the notes of the learned county court judge and his judgment led to the conclusion that he had determined as a matter of law that the plaintiff had no right of action at all, for he nonsuited the plaintiff with costs. But the course which the argument has taken and the admission made by Mr. Milward that the plaintiff in any event has a right to recover for the trespass committed by the defendant's sheep for a certain number of days prior to the order being made under the Diseases of Animals Act, 1894, makes it necessary to consider, and makes it advisable also that one should express an opinion upon, the question of damages in this case and upon the right of the plaintiff to recover either all or any other damages except those which Mr. Milward admits are recoverable. Before discussing the question of damages I should say that in my opinion the case of *Cox* v. *Burbidge* (2), the well-known case of a horse kicking

(1) (1718) 1 Str. 192. (2) 13 C. B. (N.S.) 430.

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a child upon a highway, has no application at all to the present case. The learned county court judge seems to have been misled by the reference to that case and by the reference to another case of *Cooke* v. *Waring* (1), about which I will say a word in a moment. *Cox* v. *Burbidge* (2) was cited by the defendant as an authority for the proposition that in a case like the present, where the defendant's sheep had trespassed on to the plaintiff's land and had subsequently exhibited symptoms of scab in consequence of which a notice of detention had been made under the Diseases of Animals Act, 1894, it was necessary to prove scienter on the part of the defendant—that is to say, it was necessary to prove that the defendant knew that the sheep were diseased or affected with this complaint at the time when they committed a trespass. The county court judge appears to have given effect to that argument, because he thereupon nonsuited the plaintiff, apparently on the ground that there was no evidence of scienter on the part of the defendant.

Now, when the case of *Cox* v. *Burbidge* (2) and subsequent cases of kicking horses are examined, it seems to me that the result of them for the purpose of the present argument is simply this: In the case of *Cox* v. *Burbidge* (2) the Court held that it was not natural for a horse that was trespassing to kick a child, and that therefore the owner of the horse was not liable unless scienter was proved. In the subsequent cases of *Lee* v. *Riley* (3) and *Ellis* v. *Loftus Iron Co.* (4) it was held that it was natural for a trespassing horse to kick another horse and that no proof of scienter was necessary. One of those cases was the case of a mare kicking a horse and the other was a case of a stallion kicking a mare, and in both cases the Court came to the conclusion that the offending horse was trespassing, and it was natural when it came in contact with another horse that it should kick. I notice the learned author of Mayne on Damages says (8th ed., p. 77): "If in any future case both animals are geldings, an interesting question as to horse nature will arise." However, that is the result of those cases so far as the argument in the present case is concerned, and they appear to me to have nothing to do with the present case, which is an action for trespass, and, it being admitted that the defendant is liable for some

(1) 2 H. & C. 332.
(2) 13 C. B. (N.S.) 430.
(3) 18 C. B. (N.S.) 722.
(4) (1874) L. R. 10 C. P. 10.

damage, the only question is whether the damages which are claimed in this action, or any of them, are too remote. I said that I would make an observation on *Cooke* v. *Waring* (1), which was relied on before the county court judge, and which undoubtedly at first sight appears to be an authority for the proposition for which the defendant contends. It was there held that the plaintiff could not recover where the defendant's sheep had trespassed upon his land, they being at the time diseased with scab, unless there was proof that the defendant knew they were so diseased at the time, and if that action had been an action brought in the form of a claim for trespass it would have been difficult, and perhaps impossible, to distinguish it from the present. But that case was decided in the year 1863, when the forms of pleading were of much greater importance than they now are, and, looking at the declaration in that case, it is quite clear that it was not a claim for trespass, but for negligence, and all that the Court really decided was that in an action based on negligence it was necessary to prove scienter. The learned Serjeant Pigott, who argued the case for the defendant upholding the ruling of the judge at the trial that it was necessary to prove scienter, in the course of his argument twice over admitted that the action might have been maintained if it had been in form an action for trespass. He says in one part of his argument (2): "an action might be maintained in respect of the trespass and the injury caused by the kick would form the subject of consequential damage." Later again he says: "where there is no trespass there must be proof of a scienter or negligence on the part of the owner. It may be admitted that trespass might have been maintained here but that form of action has not been adopted"; and it is clear, looking at the judgment, that the Court proceeded upon the ground that it was necessary to prove scienter because the action was one based on negligence. The Court did not decide that there would have been the same necessity if the action had been an action for trespass. Speaking for myself, I feel some doubt, even if an action were brought in the same form at the present day, whether, having regard to the provisions of the Diseases of Animals Act, 1894, the same decision would now be given, because that Act contains these provisions in s. 4, sub-s. 1: "Every person having in his possession

(1) 2 H. & C. 332. (2) Ibid. 336.

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or under his charge an animal affected with disease, shall (*a*) as far as practicable keep that animal separate from animals not so affected; and (*b*) with all practicable speed give notice of the fact of the animal being so affected to a constable of the police force for the police area wherein the animal so affected is." So it might well be that under the provisions of the statute now in force it might not be necessary to prove scienter even in an action for negligence, because, having regard to the fact that a man has in his possession an animal affected with disease, he is bound as far as practicable to keep that animal separate from animals not so affected. However, it is not necessary to decide that point. It is enough to say that for the reasons which I have given *Cooke* v. *Waring* (1), which undoubtedly influenced the county court judge, is not an authority against the plaintiff's right to recover in this case.

Now, turning to the question of the remoteness of damage, my learned brother has already expressed the principles which must be applied by the county court judge, and I will only add a few words of my own. The question is, Is the damage complained of a natural and reasonable result of the defendant's act? And in my opinion it will assume this character if it can be shown to be such a consequence as would in the ordinary course flow from a trespass. Here it is strenuously contended that the bulk of the damages claimed is the result of the notice of detention made by the police under this Act of Parliament, not only of the defendant's sheep upon the plaintiff's land, but also of the plaintiff's own sheep upon the plaintiff's own land, because they had come in contact with those of the defendant. It appears to me to be the natural consequence of the trespass by the defendant's sheep that the plaintiff's own sheep might contract scab from the defendant's sheep, and the result of the notice of detention by a lawful authority in a certain prescribed area and for the whole time until that notice was withdrawn was that the plaintiff was unable to remove his own sheep to any other ground for the purpose of their feeding or to use that area for feeding his own cattle. It might well be, therefore, that he was compelled to expend extra money in providing artificial food for his own sheep and also for his own cattle. That notice so given was in my opinion the direct and natural consequence of the trespass, and it is not

(1) 2 H. & C. 332.

open to the defendant to contend, as Mr. Milward did, that he in consequence of the notice could not remove his own sheep and so put an end to the trouble and annoyance they caused, because it has been decided that such a contention affords no answer in the case of a continuing trespass. If, for instance, a man chooses to build a house upon another's land that is a continuing trespass, and it is no answer for the defendant when sued for a continuing trespass to say that he cannot go upon the land to remove it because he would be committing another trespass if he did. *Thompson* v. *Gibson* (1) is a direct authority for that proposition, where it was held that in the case of a continuing nuisance caused by a building the defendants were liable for continuing the nuisance although they had no right to enter upon the land to remove it. I think that is a complete answer to the point made by Mr. Milward. There is one authority which I think it necessary to consider, and to which the attention of the county court judge may well be called in order that it may be compared with the case of *Cooke* v. *Waring*. (2) I refer to an old case of *Anderson* v. *Buckton* (3), where the claim was for "trespass for the entry of diseased cattle into the plaintiff's close per quod the plaintiff's cattle were infected." It is not necessary to follow the course of the argument in that case. I only quote it for the purpose of showing that consequential damages resulting from the trespass may be recoverable, and that in the present instance the plaintiff's claim for damages is not necessarily limited to the amount of grass which the defendant's sheep consumed, but includes any loss naturally following from the trespass. I do not enter further into details with respect to the items. The principles we have stated will be a sufficient guide to the county court judge.

Solicitors for appellant: *Willis & Willis, for A. Lionel Lane, Gloucester.*

Solicitors for respondent: *Norris, Allens & Co., for W. B. Hulme, Worcester.*

(1) (1841) 7 M. & W. 456. (2) 2 H. & C. 332.
(3) 1 Str. 192.

A. C.

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May 6.

THE KING *v.* REGISTRAR OF BURY COUNTY COURT.

Employer and Workman—Accident to Infant Workman—Compensation—Agreement for Redemption of Weekly Payment—Application to record Agreement—Death of Infant before Registration—Agreement "conditional only"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., par.* 9 (*d*)—*Workmen's Compensation Rules, r.* 44, *par.* 6.

By Sched. II., par. 9, of the Workmen's Compensation Act, 1906, where "any matter" is "decided under this Act . . . . by agreement" a memorandum thereof is to be sent to the registrar of the county court, who shall, "subject to rules of court," record it.

By r. 44, par. 6, of the Workmen's Compensation Rules, "An agreement made by or on behalf of any person under any legal disability shall be conditional only unless and until a memorandum thereof has been recorded in accordance with the Act and these rules."

An agreement was entered into on behalf of an infant workman for the redemption of a weekly payment by a lump sum, and sent to the registrar to be recorded. Before it was recorded the workman died:—

Held, that, notwithstanding r. 44, par. 6, the death of the infant workman did not affect the obligation of the registrar to record the agreement.

The meaning of that rule is that the agreement of a person under a legal disability, such as an infant, is "conditional" in the sense, not that it is of no validity until recorded, but that it is liable to be set aside if it does not satisfy the condition of being for that person's benefit, and that until so set aside it is just as valid as an agreement made by a person of full age.

RULE for a mandamus to the registrar of the Bury (Lancashire) County Court.

On September 18, 1916, James Oscar Prestwich, aged seventeen and a half years, while working in the employment of Messrs. J. Hardman & Sons, of Radcliffe, as a wheelwright's apprentice, met with an accident. His employers admitted liability under the Workmen's Compensation Act, 1906, and agreed to pay him a weekly sum of 8*s.* 5*d.* The weekly payments continued down to May, 1917, when on May 10 an oral agreement was entered into between the employers on the one hand and the infant's mother and brother as

his guardians on the other for the redemption of the said weekly payment of 8*s.* 5*d.* by a lump sum of 25*l.* The mother and brother of the infant were not in fact his guardians as he had a father alive, but in consequence of the father's illness they purported to act as such. A memorandum of the agreement was subsequently signed by the parties and on May 24 was sent to the registrar of the Bury County Court to be registered under Sched. II., par. 9, of the said Act. (1) The registrar was of opinion that 25*l.* was prima facie an inadequate sum, and he gave the parties an appointment for May 29 to appear before him and discuss the question of adequacy. On May 26 the infant James Oscar Prestwich died. The matter was adjourned for some time to allow of the lad's father, who claimed to be entitled to the 25*l.* as his son's personal representative, to take out letters of administration. This was done, and on October 10 the solicitors for the father and the employers respectively appeared

(1) By Sched. II., par. 9, of the Workmen's Compensation Act, 1906, "Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the committee or arbitrator, or by any party interested, to the registrar of the county court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment.

"Provided that—

. . . . . .

"(*d*) Where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall, in accordance with rules of court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just."

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before the registrar to discuss the matter, when the registrar took the objection that the agreement of May 10 was conditional only and of no validity until recorded by reason of r. 44, par. 6, of the Workmen's Compensation Rules, and that in consequence of the lad's death it had come to an end, so that there was nothing left to record. He accordingly refused to record it. A rule was then obtained on behalf of the father, James Prestwich, for a mandamus to the registrar to record the agreement or to refer it to the judge.

Branson, on behalf of the registrar, showed cause. When the matter was before the registrar reliance was placed on behalf of the father on the case of *Price* v. *Westminster Brymbo Coal and Coke Co.* (1), where it was held that, an agreement having been entered into by an injured workman for the redemption of a weekly payment by a lump sum, the subsequent death of the workman before registration did not prevent the agreement from being recorded. But that case is distinguishable. There the workman was an adult, and though the agreement, even of an adult, is open to review by the registrar or judge on the question of the adequacy of the sum agreed, it is binding until it has been set aside. Lord Cozens-Hardy M.R. there said: "The agreement was not in fact or in form conditional until recorded." But in the case of an infant it is otherwise, for r. 44, par. 6, says: "An agreement made by or on behalf of any person under any legal disability shall be conditional only unless and until a memorandum thereof has been recorded in accordance with the Act and these rules." And by Sched. II., par. 9, the obligation of the registrar to record an agreement sent to him for that purpose is expressly declared to be subject to the rules of Court, including the above rule. It was on this ground that the registrar distinguished that case. The agreement in question could not confer any right of property in the deceased until it was recorded, and as he died before it was so recorded there was nothing that could pass to his personal representative. He could not have sued on the unrecorded agreement if he had lived, and his representative could not have a right to have a judgment entered up after his death. If an infant workman is to be regarded as acquiring a legal title to the agreed sum before registration it is difficult to give any

(1) [1915] 2 K. B. 128, 132.

effect whatever to r. 44, par. 6. There is an additional reason here why the registrar should not record this agreement, namely, that the parties who entered into it were not in fact the guardians of the deceased, and there is no evidence that it was entered into with the assent of the father or even of the deceased himself. The registrar cannot be bound to refer a matter to the judge when he has no actual agreement before him. This point was not taken before the registrar, but it is none the less a good reason why the mandamus should not go.

H. S. Q. Henriques, in support of the rule. The Act gives the same protection to an adult as to an infant against an improvident agreement for a lump sum. The adult's agreement is just as much open to review by the registrar as is that of an infant; the one is just as much conditional as the other. But the case of *Price* v. *Westminster Brymbo Coal and Coke Co.* (1) shows that that is no objection to the adult's agreement being recorded after his death. Why, then, should it be so in the case of an infant? Here the infant had during his lifetime a right to have his agreement recorded subject to its satisfying the requirements of the registrar as to its sufficiency; and that right on his death passed to his administrator. If the registrar's contention is right, an infant is much worse off under the Act than an adult, although r. 44, par. 6, was obviously made in the infant's interest. [He referred to *Rhodes* v. *Soothill Wood Colliery Co.* (2)]

DARLING J. This is a difficult and puzzling case, but I have come to the conclusion that the rule should be made absolute. By par. 9 of Sched. II. it is enacted that upon a memorandum of an agreement under the Act being sent to the registrar of the county court he "shall . . . . on being satisfied as to its genuineness, record such memorandum," and it has been decided in *Price* v. *Westminster Brymbo Coal and Coke Co.* (1) that his obligation to record it is not affected by the fact of the workman dying before it has in fact been recorded. In that case no doubt the workman was an adult. But by proviso (*d*), "Where it appears to the registrar . . . . that an agreement as to the redemption of a weekly payment by a lump sum . . . . ought not to be registered by

(1) [1915] 2 K. B. 128, 132. (2) [1909] 1 K. B. 191.

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reason of the inadequacy of the sum . . . . he may refuse to record the memorandum . . . . and refer the matter to the judge." Now that applies as well to the agreements of adults as of infants, and the agreement of an adult is consequently conditional in the sense that, if the lump sum should appear to be inadequate, the judge on its being referred to him may set it aside. Yet *Price's Case* (1) establishes that the fact of its being so conditional does not prevent the workman from acquiring, even before registration, a right to the agreed sum which will pass to his personal representatives in the event of his death. In the present case the matter is complicated by the fact of the deceased workman being an infant. I leave out of consideration the question whether this agreement was made with the assent of the boy or by his lawful guardians. That is a question which may possibly be raised when it is attempted to enforce the agreement. The difficulty which arises here is caused by r. 44, par. 6, which says that "An agreement made by or on behalf of any person under any legal disability," which includes an infant, "shall be conditional only unless and until a memorandum thereof has been recorded." The question is, what is meant by that term "conditional"? I think that the condition which the rule is referring to is the condition which attaches to all contracts of an infant, namely, that they shall be for the infant's benefit, a condition which may involve other considerations besides that of the adequacy of the sum agreed. But this wider condition which exists in the case of an agreement by an infant will not differ in effect from that which exists in the case of an agreement by an adult, and if the condition that the agreed sum shall be adequate does not prevent an adult's representatives from insisting that his agreement shall be recorded, neither will the condition that the agreement shall be for the maker's benefit prevent an infant's representatives from similarly insisting. In my opinion the agreement of an infant in this respect stands on precisely the same footing as that of an adult, and the decision in *Price's Case* (1) applies as well to the one as to the other. I think the mandamus should go to order the registrar to deal with the matter exactly as he would have had to deal with it had the infant workman been alive when it was brought to him to register.

(1) [1915] 2 K. B. 128.

LAWRENCE J. I am of the same opinion, though I am by no means abundantly clear upon the matter. It seems to me that the meaning of r. 44, par. 6, is that the registrar must consider all those matters which a Court has to consider when dealing with the validity of an infant's contract, but that it does not mean that an infant's contract under the Act is to be of no validity unless and until it is recorded, or that his death before registration would preclude his representatives from demanding that it should be registered provided that it satisfies the conditions of a valid infant's contract. The infant during his life can submit his agreement to the registrar for consideration, and I do not see anything in the Act or in the rules to suggest that the fact of his death prevents the registrar from considering the matter and registering the agreement if he thinks it is a proper one for registration. The registrar will have under proviso (*d*) to consider not merely whether the sum agreed is adequate, but also whether the agreement has been obtained by improper means. Here the agreement certainly invites consideration on the latter question, as it was obtained, so far as appears, without the concurrence either of the infant himself or of his legal guardian. If, however, the matter is referred to the judge, and he is satisfied that the sum was adequate and that the agreement was not obtained by improper means, I think he ought to record it.

AVORY J. I assume for the purpose of my judgment in this case that the agreement was made with the sanction of the infant. It purports, on the face of it, to be made by his mother and brother as his guardians, and in the proceedings before the registrar it was not suggested that he was not a party to it or that it was not made with his father's assent. I agree with my brother Lawrence that if it should turn out that it was not made with his sanction or with that of his father that will be a matter for consideration by the registrar. But, assuming that the agreement was one to which the infant was a party, it appears to me that the registrar is not justified in refusing to exercise his jurisdiction under par. 9 because the infant has died before he could exercise it. It seems to me that *Price* v. *Westminster Brymbo Coal and Coke Co.* (1) is an authority for the proposition that the death of the workman before the

(1) [1915] 2 K. B. 128.

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agreement has been registered is not a reason for refusing registration. It also appears to me that the fact of r. 44, par. 6, providing that an agreement made by an infant under the Act shall be conditional only until it is registered does not prevent the registrar from exercising his jurisdiction. If it did, then, as Mr. Henriques has pointed out, an infant would be in a worse position under this Act than an adult. I agree that the rule should be made absolute ordering the registrar to exercise his jurisdiction—that is, either to record the agreement or to refer the matter to the judge.

Rule absolute.

Solicitor for registrar: *Solicitor to the Treasury.*

Solicitor for prosecutor: *E. F. Hunt, for Clayton, Horsfield & Clayton, Radcliffe.*

J. F. C.

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May 13.

PAYZU, LIMITED, APPELLANTS *v.* HANNAFORD, RESPONDENT.

Employer and Workman—Contract of Hiring—Termination—Reasonable Notice—Implied Term.

Where there is a contract of hiring of a workman and nothing is said on either side as to any notice to be given to determine the contract, it is an implied term of the contract that it can be determined only by either party giving a reasonable notice.

CASE stated by a metropolitan police magistrate.

The respondent, Doris Hannaford, was summoned upon a dispute under the Employers and Workmen Act, 1875, a complaint being preferred against her by Payzu, Limited, the appellants, for that she, being employed at a weekly wage of 35*s.*, left the appellants' employ without giving one week's notice, in consequence whereof the appellants claimed as damages 35*s.* less 5*s.* 10*d.* one day's wages as hereinafter appearing.

At the hearing of the complaint it was proved or admitted that John Stuart, the managing director of the appellant company, which carried on business as blouse manufacturers at 41, Foley

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Street, W., verbally engaged the respondent as a machinist at a weekly wage of 35*s*. Nothing was said on either side as to any notice to be given to determine the contract. The appellants paid their servants every Saturday for the week ending the previous day. The respondent worked for the appellants from Friday, November 30, 1917, up to and including Saturday, January 12, 1918, and was paid 35*s*. a week up to and including the week ending Friday, January 11, 1918, the payment for the last week being made in accordance with the usual custom on Saturday, January 12. The respondent gave the appellants no notice of her intention to leave their employment, but she failed to appear on Monday, January 14, and since that date had never returned to their premises. The appellants suffered damage owing to the respondent leaving their employ without notice.

It was contended on behalf of the appellants that it was an implied term of the contract of service that the party desirous of terminating the contract should give a week's notice to the other side and that the appellants were entitled to damages from the respondent for breach of the said term of the contract.

The magistrate was of opinion that on the facts stated it was not an implied term of the contract that notice should be given to determine the contract, and he accordingly dismissed the complaint.

The question for the opinion of the Court was whether upon the above statement of facts the determination was correct in point of law.

G. H. Head, for the appellants. It is an implied term of such a contract of hiring as this that the employment cannot be terminated by either party except by giving a reasonable notice: *Creen* v. *Wright* (1); Macdonell on Master and Servant, 2nd ed., p. 138.

The respondent appeared in person and stated that her wages, although they were paid weekly, were 5*s*. 10*d*. a day, and not 35*s*. a week.

DARLING J. I think that this appeal ought to be allowed. The magistrate has held that in the case of a weekly hiring, where nothing

(1) (1876) 1 C. P. D. 591.

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is said as to the giving of notice to terminate the employment, it is not an implied term of the contract that notice shall be given. In other words, that the workman may leave, or the employer may dismiss him, without giving any notice. That is, in my opinion, contrary to the general rule, which is that a reasonable notice must be given. From what the respondent has stated to us it appears somewhat doubtful whether there really was a weekly hiring, for she says that she was paid by the day and not by the week. Further, the magistrate does not appear to have noticed that the respondent worked on the Saturday before she left, that is, on the first day of a new week, and if the magistrate's view were right, it would follow logically that if the respondent had worked each day of that week up to Thursday the employers could have dismissed her on the Thursday without notice and without paying her anything for the part of the week in which she had worked. The employers did in fact pay her for the Saturday on which she worked, because they deducted the wages for that day from the damages which they claimed.

The case must be remitted to the magistrate for him to consider whether it was a weekly or a daily hiring. If it were the latter, the respondent would only be bound to give a day's notice and the damages would be reduced accordingly.

A. T. LAWRENCE J. I am of the same opinion. The magistrate was not right in holding that the contract of employment could be terminated without notice. The better view is that a reasonable notice must be given—what is a reasonable notice is in each case a question of fact. The magistrate has found that there was a weekly hiring in this case, but he has ignored the fact that the respondent worked on one day of the new week, and it is impossible to hold that the respondent was then entitled to leave without notice without also holding that the employers could have dismissed her in the middle of a week without notice and without paying her for the part of the week during which she had worked. But, as I have said, I do not think that is a correct view of the law. In a hiring for a week, the contract is entire for the week. It involves a promise to serve on the one side, and to employ and pay on the other. To terminate the service during the week is manifestly a breach of

this contract; the utmost the law can imply in order to give some elasticity to it is a right to determine upon giving a reasonable notice.

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AVORY J. I agree.

Appeal allowed; case remitted.

Solicitors for appellants: *W. H. Martin & Co.*

F. O. R.

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May 7, 8, 15.

Landlord and Tenant—Determination of Tenancy—Validity of Notice—Notice enclosed in covering Letter.

An agreement for a yearly tenancy of a small holding provided that the tenancy might be determined by a six months' written notice expiring at any Michaelmas. On March 21, 1917, the agent for the landlords sent to the defendant a written notice to quit on October 11, 1917. The notice to quit was enclosed in a letter in which the agent said "I am instructed by the Small Holdings and Allotments Committee to serve upon you the enclosed notice to quit which is intended to terminate your tenancy at Michaelmas next unless they see sufficient reason in the meantime to change their opinion." The tenant claimed that the notice was a conditional notice and therefore invalid:—

Held, that the notice, read with the covering letter, was a definite notice that the tenancy would be determined at Michaelmas; that the covering letter only gave expression to the right which a landlord has to waive a notice to quit by arrangement with the tenant, and that therefore the notice was valid.

APPEAL from King's Lynn County Court.

The defendant in October, 1912, entered into a verbal agreement to hire a small holding of about thirty-four acres known as Green Marsh Farm at Terrington St. Clement, Norfolk, of the Norfolk County Council on a yearly tenancy at the rent of 96*l.* 10*s.*, but he understood that he would have to enter into a written agreement. The agreement, which was signed in April, 1913, contained a clause providing that the tenancy might be determined by either party on a six months' written notice expiring at any Michaelmas. The defendant on entering into possession paid 49*l.* for the tenant right

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valuation. On March 21, 1917, the following notice to quit was sent to the defendant by the land agent to the Norfolk County Council: "I hereby as agent to the Norfolk County Council, and on their behalf, give you notice to quit and deliver up possession of the house, buildings and land, and premises, with the appurtenances, situate at Terrington St. Clement or elsewhere in the county of Norfolk, which you hold of the council as tenant thereof, on the 11th day of October, 1917." The notice to quit was enclosed in a letter in these terms: "I am instructed by the Small Holdings and Allotments Committee to serve upon you the enclosed notice to quit which is intended to terminate your tenancy at Michaelmas next unless they see sufficient reason in the meantime to change their opinion."

The Norfolk County Council commenced proceedings in the county court under s. 138 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), to recover possession of the farm, alleging that the tenancy had been duly determined by the notice to quit. The defence set up by the defendant alleged (inter alia) that the notice to quit and the letter in which it was enclosed must be read together, and that they did not constitute a valid notice to quit.

The county court judge held that the notice to quit was not definite or final or unequivocal, and that it was therefore invalid. (1)

The plaintiffs appealed.

Colam, K.C., and *Leighton*, for the plaintiffs. The notice to quit was a definite notice to quit and therefore valid. The letter which

(1) The case is reported only on this point. The county court judge also held that the defendant was not bound by the terms of the written agreement as he signed it under duress; that under the verbal agreement he was entitled to twelve months to quit; that he had no jurisdiction to entertain the plaintiff's claim as a portion of the 49*l.* paid by the defendant for the tenant right valuation was a premium paid to the landlord within the meaning of s. 138 of the County Courts Act. The county court judge also awarded the defendant 40*l.* damages on a counter-claim for an alleged breach by the plaintiff of an agreement to make up a road. The Divisional Court reversed the decision of the county court judge upon all these points, holding that there was no evidence of any duress or of any agreement to make up the road, and that no portion of the 49*l.* was a premium.

accompanied the notice to quit did not make it a conditional notice: see *May* v. *Borup* (1); it merely held out some hope to the defendant that if he paid his rent the notice to quit might not be insisted upon. The plaintiffs after serving that notice could not have insisted upon the defendant paying rent on the ground that the tenancy was still subsisting. No case has held that a notice to quit, which is otherwise valid, is rendered invalid by an accompanying letter. Cotton L.J. in *Ahearn* v. *Bellman* (2), where the tenant sent a notice to quit which contained an offer to continue in possession in a certain event, pointed out that if the fresh offer had been on a separate piece of paper it could hardly be contended that it would vitiate the notice to quit.

Hemmerde, K.C., and *A. H. Poyser*, for the defendant. The notice to quit was bad as it contained a reservation on the part of the landlords which prevented it from being an absolute notice to quit.

[AVORY J. referred to *Bury* v. *Thompson*. (3)]

A notice to quit must be plain and unequivocal in its terms, leaving no doubt as to the intention of the party giving it: *Gardner* v. *Ingram*. (4) The plaintiffs in the present case were merely holding out a threat that a notice to quit would be given; that is not sufficient. Particularly in the case of an agricultural holding, it is essential that a notice to quit should be unequivocal and final in order that the tenant may know what his position is.

Leighton replied.

Cur. adv. vult.

May 15. AVORY J. read a judgment in which he dealt with various points not calling for a report, and continued: As to the validity of the notice to determine the tenancy a more difficult question arises. The county court judge has held that it was not definite or final or unequivocal and therefore was invalid. The notice itself was in this form: [His Lordship read the notice.] But it was enclosed in a letter in these terms: "I am instructed by the Small Holdings and Allotments Committee to serve upon you the enclosed notice to quit which is intended to terminate your tenancy at Michaelmas next unless they see sufficient reason in the meantime to change their

(1) [1915] 1 K. B. 830.
(2) (1879) 4 Ex. D. 201, 213.
(3) [1895] 1 Q. B. 696.
(4) (1889) 61 L. T. 729, 730.

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opinion," and the question is whether the covering letter incorporates into the notice any condition or reservation which invalidates it. There is no doubt that a notice to determine a tenancy, whether given by landlord or tenant, must be definite and unequivocal, but I think the decisions upon the point establish that the test to be applied in either case is whether it is so vague or uncertain that it is unsafe for the tenant or landlord, as the case may be, who receives the notice to act upon it. In *Gardner* v. *Ingram* (1), upon which the county court judge relied, Bowen L.J. said: "The tenant used language on which the landlord could not safely act." In *Ahearn* v. *Bellman* (2), where the notice was held good although it contained an option to the tenant to continue in possession at an increased rent, Cotton L.J. said (3): "Then it has been said, and truly said, that a notice to determine the tenancy must be clear and unambiguous; but that does not at all, in my opinion, mean that a notice otherwise sufficient is made insufficient by its being accompanied by something else; notice to quit must be clear and unambiguous, so as to shew the tenant what the landlord has bound himself to do—no longer to require of the tenant to pay rent or to be treated as a tenant; and if a notice does not definitely state that the landlord will no longer require the rent and treat the person to whom it is sent as tenant under the then existing tenancy by the day named, undoubtedly it is bad"; and speaking of the notice in that case, he says (4): "It would be quite impossible for the plaintiff after that to turn round and say, 'I still continue to treat you as holding under the existing tenancy'"; and Bramwell L.J. said (5): "Let us suppose that the tenant had given a notice to quit sufficient in its terms, and had said, 'But I am willing to continue in possession and will, if you will let me, at the diminished rent of so much.' Could there have been any doubt that that would have been a good notice on the part of the tenant?" and Brett L.J., who differed in that case from the other members of the Court, said (6) that the notice in that case "is not a proposition made to the tenant so that he could not do anything afterwards without the consent of the landlord," which means, as I understand it, that if the proposition which is made to

(1) 61 L. T. 729, 730.
(2) 4 Ex. D. 201.
(3) Ibid. 212.
(4) Ibid. 213.
(5) Ibid. 214.
(6) Ibid. 208.

the tenant is such that he cannot do anything afterwards without the consent of the landlord, then it would be good. In *Bury* v. *Thompson* (1), where a notice to determine a lease at the end of the first seven years was qualified by the words "I shall not be able to stop unless some reduction [in rent] is made," the notice was held good, and Pollock B. in the Divisional Court (2) said that it was a notice on which the landlord would be entitled to act.

In *May* v. *Borup* (3), a case very similar to the present, the notice by the tenant was held good although it contained a suggestion that he might continue the tenancy, and Lawrence J. said the alleged condition was a mere statement of the tenant's hopes and expectations.

In the present case it appears to me that the notice, read with the covering letter, is a definite notice that the tenancy will be determined at Michaelmas subject to the landlords' subsequent consent to allow it to continue, but the landlords' consent could not be effective without the consent of the tenant and could not compel him to stay on or to pay rent after Michaelmas, and the tenant, therefore, could safely act upon it and make his arrangements for quitting. The covering letter only gives expression to the right which a landlord always has to waive a notice to quit by arrangement with the tenant, and the correspondence shows that the defendant treated the notice as a valid notice to quit at Michaelmas unless he could induce the landlords to waive it. In my opinion the notice was valid and the objection to it fails.

For these reasons I think there was no defence to the action and that judgment should be entered for the plaintiffs.

I ought to add that my brother Lawrence, who is unable to be present to-day, has read this judgment and desires me to say that he agrees in it.

Appeal allowed.

Solicitor for plaintiffs: *C. F. Martelli, for Butcher & Andrews, Fakenham.*

Solicitors for defendant: *Beckingsale & Co., for Dudley S. Page, King's Lynn.*

(1) [1895] 1 Q. B. 696. (2) [1895] 1 Q. B. 231, 235.
(3) [1915] 1 K. B. 830.

R. F. S.

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April 19, 26;
May 10, 16.

BARKER *v.* STICKNEY.

[1916 B. 2594.]

Copyright — Assignment — Assignment over — Royalties — Liability of Second Assignee—Covenant running with Personalty—Charge—Vendor's Lien—Rules for ascertaining Reservation of—Conditional Assignment—Novation.

The author of a book assigned by deed to a company the exclusive right of publishing it so that upon publication the company should be the sole owner of the copyright therein. The company undertook to publish the book forthwith at their own risk and expense. In addition to an allotment of shares to the author, the company covenanted to pay him a royalty on the price of copies disposed of, to sell at prices agreed upon by the parties, to assign only to successors in business and subject to the terms of the deed so far as applicable, to keep and furnish accounts of sales, and to allow the author to inspect the books of the company relating to the publication and sale of the work.

The company and a receiver appointed by debenture-holders subsequently with the assent of the ordinary creditors sold to a purchaser, who was a successor in business of the company, the copyright in the book so far only as the vendors had any right to sell and subject to all equitable or other claims thereon.

In an action by the author against the purchaser for an account and payment of royalties:—

Held—(1.) that the purchaser was not under any contractual liability to account for or pay royalties to the author: *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* [1902] 1 Ch. 146 followed;

(2.) that the deed of assignment to the company did not make the royalties a charge upon the copyright;

(3.) that, inasmuch as the deed constituted the company the sole owner of the copyright, and did not express that the royalties were to be paid as part of the purchase-money, it did not operate to reserve a vendor's lien for unpaid royalties: *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell* [1908] 2 Ch. 127 distinguished;

(4.) that a mere reservation of royalties does not reserve a vendor's lien for royalties unpaid: *In re Grant Richards* [1907] 2 K. B. 33 approved.

Held, consequently, that the plaintiff was not entitled to an account or payment.

Trial of action before McCardie J. without a jury.

The facts and arguments are fully stated in the written judgment of the learned judge.

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Colam, K.C., *A. Neilson*, and *Sir A. Callaghan*, for the plaintiff.

J. B. Matthews, K.C., and *G. A. Scott* (*Stuart Bevan* with them), for the defendant.

Cur. adv. vult.

April 26. McCARDIE J. read the following judgment:—The points at issue in this action are of general importance to authors and publishers. The plaintiff, Barker, is the author of a useful and very well written book entitled "The Theory and Practice of Heating and Ventilation." It was completed in 1911. On January 11, 1912, a deed of transfer was executed by the plaintiff to J. F. Phillips & Sons, Limited, which, so far as material, was as follows. Clause 1: "The author assigns unto the company the exclusive right of publishing the said book in the United Kingdom and the Channel Islands and the Isle of Man, and on publication the company shall be the sole owner of the copyright therein." Clause 2: "The company shall forthwith at its own expense and risk publish the said book." Clause 5: "In addition to the allotment to the author of 1500 fully-paid shares of 1*l.* each in the capital of the company, the receipt of which shares the author hereby acknowledges, the company shall pay to the author a royalty of 33 per cent. on the cash price of all copies of the said book which shall be sold, and a royalty of 15 per cent. on the sale price of copies given away to architects, engineers and others, such respective royalties to be payable half-yearly on January 1 and July 1 in each year." Clause 6: "The company shall not dispose of the copyright in or right of publication of the said book in the United Kingdom except to such person or persons or company as may succeed to the business of the company, and subject to the terms of this agreement, so far as the same is applicable." Clause 7: "The company shall publish and push the sale of the said book at such price only as shall be agreed upon between the parties, and shall keep and furnish to the author half-yearly on January 1 and July 1 in every year all proper accounts of the sale of such book, and will give the author all reasonable facilities for inspecting and taking copies of or extracts from the books of the company relative to the publication and sale of the said book."

In pursuance of this deed, the book was published in the year 1912. The ordinary retail price was agreed at 25*s.* The 1500 shares

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were duly allotted to the plaintiff. Then the company, of which the plaintiff was one of the directors, fell into financial difficulties. On August 12, 1912, a receiver of all the assets of the company was appointed by the debenture-holders; and subsequently he acted by consent on behalf also of the ordinary creditors of the company. No order has been made for winding up the company. The defendant was the secretary of the company since June, 1912. On June 30, 1913, a deed was executed whereby the company and the receiver sold to the defendant the goodwill of the business, including the benefit of all orders and contracts, and all other the assets of the business, including copyrights, but excepting certain specified book debts and patent rights. The sale of the copyright rights included in the deed was expressed to be "so far only as the vendors had any right to sell"; and "subject to all equitable or other claims thereon." It is agreed that the above sale constituted the defendant a successor of the business of the company. It is admitted that the defendant had full notice of the terms of the deed of January 10, 1912. Since the deed of June, 1913, the defendant has sold various copies of the plaintiff's book. By the statement of claim the plaintiff asks: "(1.) An account of all copies of the book disposed of by the defendant; and (2.) payment of the amount found due upon the taking of the account." The defendant denies that he is under any liability to the plaintiff, and that even if he is liable to account, he is yet not bound to pay to the plaintiff any royalties reserved by the deed of January, 1912.

The case was ably argued by Mr. Colam, K.C. (who appeared with Mr. A. Neilson and Sir Alfred Callaghan), for the plaintiff, and by Mr. J. B. Matthews, K.C., and Mr. G. A. Scott for the defendant. It is well to consider the above points raised by the defendant, apart from the less important questions in the case.

What, then, is the liability of an assignee of a copyright? The law upon the matter appears to be in a state of some uncertainty; and I am unable to find any clear or authoritative formulation. In approaching the matter it is essential to remember the established principle of contract law, that no one can sue or be sued upon a contract unless he be a party thereto. The principle of *Tweddle* v. *Atkinson* (1) remains intact. This rule was strikingly illustrated by

(1) (1861) 1 B. & S. 393.

the cases of *Taddy & Co.* v. *Sterious & Co.* (1), per Swinfen Eady J., and *McGruther* v. *Pitcher* (2) in the Court of Appeal. In those cases it was held that a sub-vendee was not bound by conditions as to price contained in the contract under which the vendor had sold to the original vendee, even though the sub-vendee had full notice of the conditions. Such conditions cannot run with the goods; and the decisions relating to sales and leases of land have no application to the case. See, too, *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (3) The rule that an undisclosed principal may sue or be sued does not conflict with the above rule; it merely illustrates a further and co-ordinate rule of law. Nor is it inconsistent with the rule that a cestui que trust may sometimes, as in *Lloyds* v. *Harper* (4), sue in equity. It follows from *McGruther* v. *Pitcher* (2) that prima facie the defendant is under no contractual liability (apart from any question of novation) to pay or account for royalties to the plaintiff.

But it is necessary to consider whether the rules are the same if the subject-matter of the contract be a copyright, or a similar monopoly form of property, such as a patent. It is at this point that doubt as to the actual legal or equitable liability of a subsequent assignee arises. In *Werderman* v. *Société Générale d'Electricité* (5) the plaintiff assigned to D. and M. a certain patent in consideration of a covenant to pay 5 per cent. of the net profits made by D. and M. in respect thereof. The deed of transfer provided that D. and M. or their assigns should keep particulars of the profits made by them in connection with the patent; and that they should render regular accounts to the plaintiff, or to his assigns. Thereafter D. and M. assigned the patents to the defendant company to hold on the same terms as the assignors. The company then used the patents in various places. The plaintiff claimed that the defendant company were bound to deliver accounts to the plaintiff in accordance with the deed, and to pay him a share of the profits as provided. But the defendant company contended that the plaintiff had no rights against them; and that his only remedy was against D. and M. It was held by the Court of Appeal that the defendant company were bound to account for and (apparently) to pay to the plaintiff a share

(1) [1904] 1 Ch. 354.
(2) [1904] 2 Ch. 306.
(3) [1915] A. C. 847.
(4) (1880) 16 Ch. D. 290.
(5) (1881) 19 Ch. D. 246.

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of the net profits made by them in respect of the patents. The words of Jessel M.R. appear to place the liability of the defendant company on the ground of contract; for he said (1): "It is tolerably plain that the parties intended certain liabilities to attach to the patent itself." He also said (2): "It is a part of the bargain that the patent shall be worked in a particular way and the profits be disposed of in a particular way, and no one taking with notice of that bargain can avoid the liability." These words were greatly relied upon by Mr. Colam in his argument for the plaintiff. If the case of *Werderman* v. *Société Générale d'Electricité* (3) stood unexplained, I should agree that it supported the case of the present plaintiff. For not only Jessel M.R. but Lush and Lindley L.JJ. held that the defendant company were liable to be sued in contract as being assignees with notice. But *Werderman's Case* (3) must be considered in the light of later decisions. It was fully dealt with by the Court of Appeal in *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (4) There Vaughan Williams L.J. pointed out that *Werderman's Case* (3) did not decide that the assignee of a patent was liable to be sued for non-performance of terms contained in a contract to which he was not a party; and he used these words (5): "All that is decided by that case is this, that if you had notice of a contract between the person under whom you claim property, real or personal, and a former owner of the property, whereby a charge or incumbrance was imposed upon the property of which you thus take possession and have the enjoyment, you take the property subject to that charge or incumbrance, and can only hold it subject thereto." In *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (4) the plaintiffs had granted to one Phelps an exclusive licence to use certain patents. Phelps was about to form a company; and he agreed, in consideration of the licence, that the company should, when formed, as a consideration for the licence, pay to the plaintiffs a yearly portion of the general profits of the company. The company was duly formed, and it actually made some use of the patents. The licence was never actually assigned to them, but Phelps had agreed to sell the licence to a trustee for the company, and the

(1) 19 Ch. D. 251.
(2) Ibid. 252.
(3) Ibid. 246.
(4) [1902] 1 Ch. 146.
(5) Ibid. 157.

defendant company had adopted the agreement. The Court of Appeal held that the defendant company was under no contractual liability whatever to the plaintiff; and they distinguished not only *Werderman's Case* (1), but also the cases of *In re Northumberland Avenue Hotel Co.* (2) and *Howard* v. *Patent Ivory Manufacturing Co.* (3) I am bound by the interpretation placed upon *Werderman's Case* (1) by the decision of the Court of Appeal in *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (4) It must therefore be taken as clearly settled law that a second assignee of a patent or a licence to use a patent does not, by the fact that he is an assignee, become contractually liable to the owner of the patent for royalties granted by the original assignment, even though the second assignee actually uses the patent or sells the copyright books and has full notice of the terms of the original assignment as to the payment of royalties. A patent and a copyright must rest on the same footing. Upon this point no difference can exist between a non-monopoly article and an article which is the subject of a statutory monopoly privilege: see *National Phonograph Co. of Australia* v. *Menck* (5), in the Privy Council. Legislation only can alter the existing law, if the rights of patentees and authors are to receive greater protection.

I now consider the second point which arises in the case, namely, whether the plaintiff possesses a vendor's lien on the copyright in question for unpaid royalties. If the answer be Yes, then it is conceded by the defendant that he is legally bound to render an account of sales for the purpose of indicating the extent of such lien, even though they be under no contractual liability to the plaintiff. I confess that this second point causes me great difficulty. I can well understand a vendor's lien in the case of land and the application of the rule thereto, that a purchaser with notice takes subject to any equitable charge (see Fisher on Mortgages, ss. 505 to 507, and the authorities there cited). But the application of the rule to the case of chattels or choses in action is a different matter. With respect to ordinary goods, the law as to vendor's lien has now been summarized in s. 62 of the Sale of Goods Act, 1893; see also Fisher

(1) 19 Ch. D. 246.
(2) (1886) 33 Ch. D. 16.
(3) (1888) 38 Ch. D. 156
(4) [1902] 1 Ch. 146.
(5) [1911] A. C. 336.

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on Mortgages, ss. 604 et seq. In the case of a copyright or patent it seems to me that the doctrine of a vendor's lien presents great embarrassment in its application. But, in view of the authorities, it must be taken that such a lien may exist, and I conceive again that no distinction can exist between a patent and a copyright. The doctrine of vendor's lien was first applied to patents by Lord Romilly M.R. in *In re Patent Carriage Co.* (1) *Werderman's Case* (2), as interpreted by *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (3), must now be taken as a mere application of the doctrine of vendor's lien to patents. The latest consideration of the doctrine is to be found in the decision of Neville J. in *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell.* (4) There the plaintiffs assigned certain patents to S. in consideration of 5000*l.* in cash and certain royalties, and S. guaranteed the annual payment of certain minimum sums as royalties during the continuance of the patents. S. then assigned the patents to the defendant company (the Rexer Arms Company, Limited), who had notice of the agreement as to royalties. In applying *Werderman's Case* (2) as explained in *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (3), Neville J. held that the plaintiffs had a vendor's lien on the patents in the hands of the defendant company for the unpaid minimum royalties. It is to be noted that neither in *Werderman's Case* (2) nor in *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell* (4) did the deed of assignment purport to create a charge on the patents in respect of the royalties reserved. I venture to think that a mere covenant to make certain payments out of property will not, without more, make the payments a charge upon property; and I should infer that the Court of Appeal in *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (3) (although not so expressly stating) inclined to that view. I confess to an inability to discover from the authorities any satisfactory or clear rule for determining as to when a vendor's lien arises. If, indeed, the whole or a part of that which is actually described as purchase-money remains unpaid, then the lien will apparently exist. But how does the case stand when the purchaser agrees to make certain future payments, for example, a royalty, which is not in practice described as purchase-money? In *Dixon* v.

(1) (1866) L. R. 2 Eq. 349.
(2) 19 Ch. D. 246.
(3) [1902] 1 Ch. 146.
(4) [1908] 2 Ch. 127.

Gayfere (1) Lord Cranworth L.C. said that the Court "must be guided by the circumstances of each particular case." This statement, however, affords no clue as to the proper tests to apply. In that case A. agreed to purchase an estate from B., and, upon the estate being conveyed, to grant a life annuity to B., to be secured by a bond. It was held that B. had no lien on the estate for the payment of the annuity. With this must be compared *Matthew* v. *Bowler*. (2) In this case it was held by Sir James Wigram V.-C. that upon the sale of a leasehold, in consideration of a weekly sum to be paid by the purchaser to the vendor during her life, the purchaser was entitled to a lien on the leasehold. I am unable to ascertain the ground upon which a lien was held to exist in *Werderman's Case*. (3) The documents and facts were most unusual, and apparently the Court of Appeal there took the view that the share of the profits payable to the patentee must be deemed to be part of the consideration moneys. The point does not seem to have been argued in view of the broader ground taken by the Court. The question as to vendor's lien was left open by the Court of Appeal in *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (4), already cited. In *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell* (5) the agreement stated expressly in the royalty clause itself that the covenant by the purchasers to pay the royalties was "a further consideration of the sale." Neville J. said this (6): "The question involved is whether, upon the true construction of the original assignment, it was intended that the vendor should retain a charge upon the property or that he should part with the property completely, looking solely to the personal liability of the purchaser to pay the consideration." This, apparently, is the question in each case; and the decision in *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell* (5) must, therefore, be deemed to turn on the particular construction of the agreement then in question. It cannot be, as I have already indicated, that whenever an author reserves royalties as part of the consideration for the assignment he becomes ipso facto entitled to a lien upon the copyright for unpaid profits or royalties. To so hold would be to establish a rule which, though

(1) (1857) 1 De G. & J. 655, 661.
(2) (1847) 6 Hare, 110.
(3) 19 Ch. D. 246.
(4) [1902] 1 Ch. 146.
(5) [1908] 2 Ch. 127.
(6) Ibid. 136.

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intelligible and perhaps useful, seems to be inconsistent with the ratio in *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell* (1) and with sound legal principles. It would, moreover, be opposed to the decision of Bigham J. in the case of *In re Grant Richards*. (2) There the author assigned to the publisher the entire copyright, without any reserve, of a certain work. The publisher agreed to print and publish various editions at his own cost; and had the absolute power to sell and assign all rights of publication or of translation of the work. The author was to be paid (*a*) one-half of the net profits actually received by the publisher, who was to keep an account of all sales, and (*b*) certain specified royalties. The publisher became bankrupt, and the trustee in bankruptcy carried on his business and made various sales of the book. It was held by Bigham J. that the author had no right as against the trustee to any account or payment; and the only remedy of the author was a proof against the estate of the publisher. Unfortunately the relevant authorities do not seem to have been presented to Bigham J. In deciding the case he expressly stated that he regarded the transaction as analogous to a sale of goods upon the terms that they are to be paid for according to different scales in different events. I may point out that the rule laid down by Bigham J. was subsequently altered, so far as bankruptcy is concerned, by s. 60 of the Bankruptcy Act of 1914; and it was enacted that the trustee of the bankrupt should only be entitled to exert copyright privilege on the terms of paying to the author such a sum by way of royalty or share of profits as would have been payable by the bankrupt. It might be well for the Legislature to extend a similar rule to a broader class of cases. The only ground on which *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell* (1) can perhaps be reconciled with *In re Grant Richards* (2) is that in the former case Neville J. was able to hold, upon the particular terms of the document there in question, that the vendor impliedly reserved a lien upon the patent for unpaid royalties. I am bound to say that an examination of the documents in the two cases leads to the conclusion that the distinction between the cases is exceedingly subtle. The very nature of the contract may sometimes negative a lien: see *In re Brentwood Brick and Coal Co.* (3) As the decisions

(1) [1908] 2 Ch. 127. (2) [1907] 2 K. B. 33.
(3) (1876) 4 Ch. D. 562.

now stand, and in the absence of formulated principles or tests by an appellate tribunal, I venture to think that the following are, perhaps, the rules applicable to the matter: (1.) The terms of an assignment may, either expressly or by clear implication, negative any lien for royalties by a patentee or author. In such cases no question of lien can arise as against a subsequent assignee. (2.) Prima facie no vendor's lien for royalties will exist if the assignment contains express words to the effect that the whole interest of the patentee or author is transferred to the assignee, or if there be an express statement that the assignee is to be the sole owner of the patent or copyright. To destroy the prima facie presumption in such a case the other terms of the bargain must show with actual clearness an intention to reserve a lien. (3.) No vendor's lien will be created by the mere reservation in the assignment of future royalties, or by mere provisions as to the obligations of second or later assignees. (4.) The terms of an assignment may expressly give a lien for future royalties. In such a case any subsequent assignee with notice takes subject to a lien in respect of all accrued and unpaid royalties. (5.) The assignment will create a vendor's lien for royalties if some of the provisions of the document fairly, though impliedly, point to a reservation of such a lien by the patentee or author, provided that the effect of such provisions is not negatived by the other terms of the bargain.

In applying these rules to the present case I point out that clause 1 of the assignment of January 10, 1912, expressly states that the assignee shall be the sole owner thereof. No such words appear in *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell.* (1) The object of these words, I conceive, is to free the copyright from any claim of property, whether legal or equitable, by the author. This negation of lien is not, I think, here overridden by the provisions of clause 6 as to the obligation of a second assignee; nor is it overridden by the recital in the assignment to the effect that the author agreed to assign in consideration of shares and royalties. The effective clauses of the assignment contain no express statement, as in *Dansk Rekylriffel Syndikat Aktieselskab* v. *Snell* (1), that the royalties are reserved "as further consideration of the sale." Clause 6 of the contract seems to place the obligation to pay royalties upon the footing of a simple contractual duty. I must therefore

(1) [1908] 2 Ch. 127.

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hold, though with doubt and regret, that the plaintiff in the present case has no vendor's lien for unpaid royalties, and that the defendant has no legal liability to account to the plaintiff. It is worthy of note that no such lien was actually alleged in the statement of claim. The plaintiff in his pleading appears to place the defendant's liability upon a purely contractual basis.

Nothing that I have said in this judgment affects the rule that a patentee or author may make a conditional assignment, or may grant a conditional licence. If that be done, then an injunction can be given against a person who holds goods within the patent or licence and seeks to deal with them contrary to the terms of the conditional assignment or licence, provided that the terms be brought to his notice at or prior to his acquisition of the goods: see *National Phonograph Co.* v. *Menck* (1) and *British Mutoscope and Biograph Co.* v. *Homer*. (2) In view of the decisions referred to in this present judgment, the principle suggested in *De Mattos* v. *Gibson* (3) must at the present day be regarded as limited in its application. I venture to add the hope that the points now before me will receive ere long the consideration of the Court of Appeal. It is desirable that the rights of patentees and authors should be clearly defined.

I can briefly deal with the other points in the case. It was contended by Mr. Matthews that even if the copyright was subject to a vendor's lien, yet the lien was limited as against the defendant to the royalties which had accrued since the assignment to the defendant of June 30, 1913. I cannot accept this view. For if the lien exists at all, I conceive that it must operate to impose upon the copyright an equitable charge in respect of all unpaid royalties, whether they accrued before or after June, 1913. In connection with this matter I may point out that the effect of the decisions I have cited, which impose the doctrine of equitable lien upon such subjects as patents and copyrights would, if my prior conclusions had compelled me to apply them to the present case, apparently call upon the defendant to account for royalties anterior to the period at which he acquired control over sales of the work. A subordinate point would here arise in the case had I held that the defendant was

(1) [1911] A. C. 336, 349, 353. (2) [1901] 1 Ch. 671.
(3) (1858) 4 De G. & J. 276.

legally liable not only to account for but also to pay to the plaintiff the royalties which had accrued upon the sales of the book. This point does not now arise, in view of the opinions I have already expressed. But as it raises a question of fact it is best to shortly deal with it. It was contended that the plaintiff had relinquished any present right to actual payment by an arrangement alleged to have been made in July, 1912, between himself and J. F. Phillips & Co. and the firm of Sidney Carton & Co. This firm had entered into a sub-contract with J. F. Phillips & Co. for printing the plaintiff's book. It will suffice to say that I have carefully considered the evidence and documents in the case, and that I am satisfied that the plaintiff never relinquished any right he possessed to the payment of royalties. I accept the plaintiff's evidence on the point.

I must mention one final point, namely, the question of novation. In the course of his able speech in reply upon the whole matter Mr. Colam suggested that a case of novation had been established as between the plaintiff, the defendant, and J. F. Phillips & Co., whereby the defendant became personally liable to pay royalties to the plaintiff. No such case had been made in the statement of claim. No witness was examined or cross-examined upon the point. The defendant had no opportunity whatever of considering or dealing with the matter. I should not, therefore, be justified in allowing an amendment of the statement of claim as suggested by Mr. Colam. I feel the more justified in refusing to assent to Mr. Colam's request, because I greatly doubt if any case of novation could be established in the present case. I do not overlook the wording of clause 1 of the assignment of June 30, 1913, nor do I forget the words of Lord Chelmsford in *Rolfe* v. *Flower, Salting & Co.* (1) But I am satisfied that the offers of the defendant contained in the correspondence to account to the plaintiff were made, not as a result of any novation, but as a result of his belief that he was under some equitable liability to the plaintiff in respect thereof by virtue of particular legal rules peculiar to copyright. Upon this point *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (2) may be considered. The plaintiff's own letters, moreover, appear to me rather to negative the suggestion of novation. I may refer, for example, to letters dated August 15, 1913,

(1) (1866) L. R. 1 P. C. 27, 44, 45. (2) [1902] 1 Ch. 153, 155, 161.

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January 12, 1915, January 20, 1915, February 4, 1915, and August 26, 1916. I cannot, therefore, allow a case of novation to be set up in the concluding minutes of a two days' trial. I am willing now to hear counsel upon the question of costs, and upon any other point they may wish to mention.

May 10. Counsel were heard on the question of costs. The learned judge was also asked to decide a question which had arisen between the parties, in case it should be held on appeal that the defendant was liable to account and with a view to preventing a new trial, namely, whether in the events which had happened the price at which the book was sold should be taken as 20*s.* per copy instead of 25*s.*, as had been agreed. These questions were reserved.

May 16. McCARDIE J. held that the price of the book was to be taken as 25*s.* per copy sold. Judgment was given for the defendant, and it was ordered that each party should pay his own costs.

Judgment for the defendant.

Solicitors for plaintiff: *Nicholls & Co.*
Solicitors for defendant: *Jenkinson, Meyler & Oliver.*

W. H. G.

[IN THE COURT OF APPEAL.]

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March 27;
April 15.

NORBURY NATZIO & CO., LIMITED *v.* GRIFFITHS.

[1917 N. 730.]

Practice—Parties—Joinder—Action on Contract—Sole Defendant—Addition of Joint Contractor as Co-defendant—Jurisdiction—Right of Defendant—Discretion.

In an action on a joint contract against one only of the joint contractors the Court has jurisdiction, without obtaining the consent of the plaintiff, to make an order requiring the plaintiff to add the other joint contractor as a co-defendant.

Where, in an action on a contract against one defendant only, the defendant shows reasonable grounds for believing that the contract was made with himself and another person as joint contractors, he has, in the absence of special circumstances showing that it should not be made, a prima facie right to an order requiring the plaintiff to add that person as a co-defendant; but the Court will make the order without prejudice to the consideration at the trial of the question whether the contract was in fact joint, and will so frame it as to protect the plaintiff in regard to costs if it should appear that that other person ought not to have been joined.

In such a case the fact that the defendant desires to have his alleged joint contractor added as a co-defendant in order that they may thereupon bring a joint counter-claim against the plaintiff is regarded by the Court as an additional ground for making the order.

Fardell Traction Haulage Co. v. *Basset* (1899) 15 Times L. R. 204 followed, and form of order adopted.

APPEAL from an order of Bray J. at chambers.

The defendant, Fred Griffiths, and one S. A. Vasey, were the executors of the will of J. J. Griffiths, deceased, the father of the defendant, and were jointly entitled thereunder to his printing business.

By a contract dated September 29, 1913, the defendant and Vasey jointly contracted to sell the printing business to the plaintiffs Norbury Natzio & Co., Limited; and it was provided thereby that as to all finished stock the plaintiffs should dispose of it at agreed prices and pay to the vendors the amount realized, and that as to all work in progress at the time of the sale the plaintiffs should complete it at agreed rates specified in a schedule to the

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contract, deliver it to the respective customers, collect the prices and pay the proceeds to the vendors, deducting their own charges for completion at the scheduled rates. Pursuant to this contract the business was assigned by the vendors to the purchasers by deed.

As the result of negotiations conducted and an arrangement effected by the defendant, the plaintiffs, after the date of the sale, printed a revised catalogue for a firm of Carter & Aynsley, Limited, at a special rate different from the rate for such work scheduled to the contract.

On October 8, 1917, the plaintiffs commenced the present action against the defendant, Fred Griffiths, alone for a sum of 516*l.* 9*s.* 4*d.* for work done and materials supplied by them as publishers in printing the revised catalogue, alleging that under the arrangement relating to the catalogue the defendant alone had contracted for the work and was liable to pay for it.

The defendant delivered a defence in which he admitted that the sum claimed was due to the plaintiffs from the executors of the defendant's father, of whom the defendant was one ; and a counter-claim by the defendant and Vasey as co-claimants for an account and payment of amounts, exceeding the amount of the plaintiffs' claim, alleged to be due from the plaintiffs to them as joint contractors under the contract of sale.

On February 5, 1918, on the application of the plaintiffs, the Master, having regard to the fact that Vasey was not a defendant in the action, made an order striking out both the defence and the counter-claim as being embarrassing and irregular.

The defendant on appeal to the judge in chambers made an application that the order of the Master should be set aside and that the plaintiffs should be ordered to join Vasey as a co-defendant, so that the two defendants could bring a counter-claim against the plaintiffs, and that the defence and counter-claim should be amended accordingly.

The appeal was supported by an affidavit of the defendant in which he stated that one of the works in hand at the time of the contract of sale was the printing of a catalogue for Carter & Aynsley, Limited ; that it was in respect of the printing of a revised catalogue in substitution for that then incomplete catalogue that the whole of the plaintiffs' claim was brought against the defendant alone,

and not, as it should have been, against himself and Vasey jointly; that an arrangement was made between the plaintiffs and the defendant on behalf of himself and Vasey that the defendant should negotiate with Carter & Aynsley, Limited, with a view to their allowing the revised catalogue to be printed by the plaintiffs; that if they did so, the scheduled rates of remuneration under the contract of sale should not apply, but that the plaintiffs should give to the defendant an estimate for the revised catalogue, to which the defendant and Vasey should add a price to cover the work previously done on the original catalogue, Carter & Aynsley, Limited, paying the defendant and Vasey the amount of this increased estimate and the defendant and Vasey paying the plaintiffs for printing the revised catalogue; that the defendant for himself and Vasey negotiated with Carter & Aynsley, Limited, who agreed to have the revised catalogue printed by the plaintiffs at a price equal to the increased estimate; that the correspondence between the plaintiffs and the defendant showed that the defendant was acting for himself and Vasey jointly; that the arrangement about the revised catalogue was simply a variation of the contract of sale; that the defendant and Vasey were admittedly liable jointly to the plaintiffs for the amount of the claim and were so liable, not as executors, but by virtue of a personal joint liability; but that they had a joint counter-claim, not as executors, but as joint vendors under the contract of sale, and that it was simply because they had not been able to get the subject-matter of their claim settled by the plaintiffs by proper accounts that they had not paid the plaintiffs' claim and for no other reason.

The appeal was heard by Bray J., and at the hearing the plaintiffs declined an offer of the judge to adjourn the proceedings in order to give them an opportunity of answering the affidavit of the defendant.

On March 9, 1918, more than three weeks after the hearing of the appeal, Bray J. made an order as follows: "The plaintiffs refusing to add S. A. Vasey as a co-defendant, no order is made on the appeal of the said defendant Fred Griffiths . . . . except that an amended defence be delivered by the defendant in seven days, and that the costs of this application be costs in the cause."

The defendant appealed.

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J. B. Matthews, K.C., and *S. C. N. Goodman*, for the defendant. The Court ought to order that Vasey be joined as a co-defendant in the action. Where an action is brought upon a contract against a sole defendant, and there is reasonable ground for believing that he entered into the contract jointly with another person, the Court has jurisdiction to make an order directing the plaintiff to join that other person as a co-defendant, without first obtaining the consent of the plaintiff, and if Bray J. thought otherwise, as the terms of his order would seem to show that he did, his view was erroneous. In such a case the defendant has a right to require that the order be made, and that the person appearing to be his co-contractor be joined as a co-defendant. Under the former procedure this right of the defendant was clearly recognized, and he was enabled to enforce it by setting up a plea in abatement in which he alleged the non-joinder of his co-contractor in bar of the action; and the plaintiff had either to admit the plea and add the co-contractor, or to join issue upon it, and, if he adopted the latter course and failed, the result was that the action abated: see Tidd's Practice, 9th ed., pp. 141, 142; Tidd's Book of Forms, 8th ed. (1840), p. 223; and Lush's Common Law Practice, 3rd ed. (1865), p. 468. The procedure by plea in abatement was modified to some extent by the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), ss. 8-11, and afterwards by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 38, 39; but its essential features were not affected by these enactments. That procedure was not merely technical, but might have important practical consequences. Thus, a defendant who succeeded on his plea in abatement in obtaining the joinder of his co-contractor as a co-defendant, if judgment was given against him in the action and he paid the judgment debt, became entitled under the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5, to have assigned to him the judgment and other securities held by the plaintiff, and to stand in the place of the plaintiff as against his co-contractor: see *Batchellor* v. *Lawrence*. (1) The present procedure under the Judicature Acts is no doubt in some respects very different from that by plea in abatement. The Rules of the Supreme Court, 1883, Order XXI., r. 20, abolished pleas in abatement; Order XVI., r. 11, provides that no cause shall be defeated by reason of the non-joinder

(1) (1861) 9 C. B. (N.S.) 543.

of parties, and that the Court may, on such terms as appear to be just, order that any parties who ought to have been joined be added; and under r. 12 of that order an application to add a party may be made to the Court by summons. Under this procedure the Court has undoubtedly a discretion as to making the order; but a defendant has still a prima facie right to require that his co-contractor be added as a co-defendant, and, in the absence of good grounds for not doing so, the Court will in general order him to be added: see *Kendall* v. *Hamilton* (1); *Pilley* v. *Robinson* (2); *Montgomery* v. *Foy, Morgan & Co.* (3); and per Lord Esher M.R. in *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (4) The cases in which the Court has refused to add the party whom it was desired to add as a co-defendant are distinguishable. In *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (4) and *McCheane* v. *Gyles* (No. 2) (5) the party sought to be joined as a co-defendant was resident out of the jurisdiction. In the last-mentioned case and in *Norris* v. *Beazley* (6) the party sought to be joined and the defendant were liable severally, and the plaintiff could sue either of them without joining the other. At the early stage of the proceedings at which the application for joinder is usually made it is not in general possible for the defendant to prove conclusively that he and the person whom he desires to join as his co-defendant were in fact joint contractors. It is not, however, necessary that he should do so; it is sufficient that he shows reasonable and probable grounds for believing that they were joint contractors: *Fardell Traction Haulage Co.* v. *Basset* (7); and here the defendant has shown such grounds. Under the present practice a defendant by obtaining the joinder of his co-contractor as a co-defendant secures the same practical advantages as under the former practice, and in addition this further advantage, that he is enabled, if he desires to do so, to set up jointly with his co-contractor a counter-claim against the plaintiff: see *Pender* v. *Taddei.* (8) In the present case one of the defendant's main reasons for desiring to have Vasey added as a co-defendant is that he and Vasey may make a joint counter-claim against the plaintiffs. If

(1) (1879) 4 App. Cas. 504.
(2) (1887) 20 Q. B. D. 155.
(3) [1895] 2 Q. B. 321.
(4) [1893] 1 Q. B. 422.
(5) [1902] 1 Ch. 911.
(6) (1877) 2 C. P. D. 80.
(7) 15 Times L. R. 204.
(8) [1898] 1 Q. B. 798.

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it should turn out at the trial that Vasey was not in fact a joint contractor with the defendant, neither the plaintiffs nor Vasey need be prejudiced, because the order for joinder can be so framed as to make the defendant liable in that event for the costs of both : *Fardell Traction Haulage Co.* v. *Basset.* (1)

Russell Davies, for the plaintiffs. The Court ought not to order that Vasey be joined as a co-defendant. The plaintiffs do not deny that in an action on a contract against a sole defendant the Court has jurisdiction to make an order directing the plaintiff to add a joint contractor of the defendant as a co-defendant without first obtaining the consent of the plaintiff to the making of the order. The defendant in such a case has no right to require that his alleged co-contractor be joined. If he ever possessed such a right, he no longer has it under the present practice. The Rules of the Supreme Court, 1883, by Order XVI., r. 11, give the Court a discretion as to the making of the order, and the discretion so given is very wide : see the observations of Lord Penzance in *Kendall* v. *Hamilton* (2), whose dissent from the other Lords of Appeal was limited to the actual point decided in that case and did not apply to the subject-matter of those observations. The authorities show that the Court ought not to exercise its discretion in favour of the defendant and make the order for joinder, unless in all the circumstances of the case there are preponderating reasons for doing so. In particular, there must be sufficient evidence to show that the defendant and the person whom he desires to have joined as his co-defendant are in fact co-contractors ; and the defendant's object in desiring to have that person joined should be to safeguard his own rights as a defendant, and not to enable him to take some independent action, as, for example, to make a counter-claim against the plaintiff : see *Norris* v. *Beazley.* (3) In the present case there are no preponderating reasons for making the order. The defendant has failed to produce any sufficient evidence of a joint contract ; and his object in seeking to join Vasey is not to secure his own rights as a defendant, but to enable himself and Vasey to bring against the plaintiffs a joint counter-claim involving the taking of a long account, during the taking of which the plaintiffs will be prevented from

(1) 15 Times L. R. 204. (2) 4 App. Cas. 530-532.
(3) 2 C. P. D. 80.

recovering the amount due to them on the claim. Even if the defendant's view is correct, that the Court has only a narrow discretion, and is bound to make the order on slight evidence of a joint contract, he has here failed to produce the evidence necessary to support his application. As to the observations of Lord Esher M.R., in *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (1), to the effect that the defendant has a prima facie right to have the person whom he alleges to be his co-contractor joined as a co-defendant, it is to be observed that in that case it was admitted by the plaintiff that the contract sued upon was a joint contract, whereas in the present case that point is in issue. If the Court should exercise its discretion in favour of the defendant and make an order that Vasey be joined as a co-defendant, it should make the order in such a form as not to preclude the plaintiffs from raising at the trial the question whether the contract was joint or several, and as not to prejudice the plaintiffs in the matter of costs or otherwise if it should appear that Vasey was not a co-contractor of the defendant and ought not to have been joined.

J. B. Matthews, K.C., replied.

PICKFORD L.J. This is an appeal from an order of Bray J. refusing an application of the defendant, Griffiths, that the plaintiffs should be ordered to join one Vasey as a co-defendant in the action. The action was brought by the plaintiffs against the defendant, Griffiths, for a sum of upwards of 500*l.* for work done by the plaintiffs under a contract. The defendant put in a defence admitting that the sum claimed was due to the plaintiffs from the executors of the estate of J. J. Griffiths, deceased, of whom the defendant was one, Vasey being the other, that is to say, that it was due not from himself alone, but from himself and Vasey as joint contractors; and he also put in a counter-claim, which he alleged that he with his co-executor had against the plaintiffs, exceeding the amount of the claim. The Master, having regard to the fact that Vasey was not a defendant in the action, made an order striking out the defence as embarrassing, and also striking out the counter-claim as embarrassing, as it obviously was on the authority of *Pender* v. *Taddei*. (2) Against that order the defendant appealed to the Judge in chambers, and on

(1) [1893] 1 Q. B. 422. (2) [1898] 1 Q. B. 798.

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the appeal he did not allege that the order was wrong, but made an application that it should be set aside and that the plaintiffs should be ordered to join Vasey as a co-defendant in the action on the ground that he was a co-contractor with the defendant, and on the further ground that he and Vasey might bring against the plaintiffs a joint counter-claim closely connected with the plaintiffs' claim and exceeding it in amount. Whether that application was rightly made in that way, or should have been by summons under Order XVI., r. 11, it is not very material to inquire, as the parties did not insist on technicalities. The appeal was supported by an affidavit of the defendant which went to show that the defendant and Vasey were liable as joint contractors for the amount of the plaintiffs' claim. I will not go at length into the matters stated by the defendant in his affidavit, in case I might seem to be intimating a view as to what the decision on the facts should be. Bray J. allowed the plaintiffs ample time to answer that affidavit, but they did not do so. The learned judge made an order which, after reciting that the plaintiffs refused to add Vasey as a co-defendant, went on to provide that no order was made on the appeal of the defendant except that an amended defence be delivered by the defendant in seven days and that the costs of the application be costs in the cause. We have been told that the judge made that order because he thought that in the absence of consent by the plaintiffs he had no jurisdiction to make the order asked for. I think counsel for the plaintiffs accepted that view and admitted that it was not in the exercise of his discretion that the judge declined to make the order asked for. I therefore deal with the case as an appeal from an order of the judge made not in the exercise of his his discretion, but because he thought that he had no jurisdiction to grant the application of the defendant. The question is whether in the circumstances the Court ought to order that Vasey be joined as a co-defendant.

As to whether the Court has jurisdiction to make the order without the consent of the plaintiff, I am satisfied that where an action is brought upon a joint contract against one only of the joint contractors, the Court or judge has undoubtedly jurisdiction, whether the plaintiff consents or not, to make an order directing the plaintiff to join the co-contractor as a co-defendant.

As to the right of the defendant to have the order made, it has been stated in the Court of Appeal in several cases, as, for example, by Lord Esher M.R. in *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (1), that in such a case the defendant has a prima facie right to have the other joint contractor joined as a co-defendant. The Court, no doubt, has a discretion whether it will make the order or not. There may be cases in which it will rightly decline to make the order, but, in the absence of special circumstances showing that it ought not to do so, its practice is to make it. If the plaintiffs admitted that the contract was a joint contract the Court would not have much trouble in deciding to make the order. Here, however, the allegation of the defendant that there is another person who is his co-contractor is not admitted, and we have to consider whether in these circumstances we should allow him to have that person joined. It is not as a rule possible for the Court to decide at this stage whether or not the contract is in fact a joint contract. It is not, however, necessary to do so. It is sufficient that the defendant makes out a reasonable and probable case of joint contract. That was decided in *Fardell Traction Haulage Co.* v. *Basset.* (2) I think that in the present case the defendant has set up a reasonable case of joint contract, though I do not say that it will be made out at the trial. That being so, it seems to me that the Court ought not to refuse to make the order for the joinder of Vasey as a co-defendant.

The defendant's special motive for desiring to have his co-contractor joined, namely, that they may raise a joint counter-claim against the plaintiffs, which exceeds the amount of the claim, is a proper and reasonable motive. The plaintiffs ought not in the circumstances to be allowed to recover from the defendant the amount of their claim, unless the defendant has an opportunity of raising his counter-claim.

In my opinion the order ought to be made. In saying this I wish to make it quite clear that I am not intimating any opinion as to whether the contract is in fact joint or several. Neither am I expressing any view as to whether the defendant is a party to the contract upon which he desires to bring his counter-claim in the same right as that in which he is a party to the contract out of which the

(1) [1893] 1 Q. B. 422. (2) 15 Times L. R. 204.

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plaintiffs' claim arises; it may be that he is a party to the one contract in his personal capacity and to the other as executor. Nor am I saying anything to prevent the plaintiffs from asking that the question whether the contract on which the claim is made is joint or several should be tried before the counter-claim. The order will not prejudice the decision of any of these questions. In other respects the order should follow that which was made in *Fardell Traction Haulage Co.* v. *Basset* (1) so as to secure that neither the plaintiffs nor Vasey shall be prejudiced by the order in case it should appear that Vasey ought not to have been joined as a co-defendant.

WARRINGTON L.J. I am of the same opinion. I have nothing to add to the judgment of Pickford L.J., whose caution I desire to imitate in abstaining from saying anything which might tend to prejudice the consideration at the trial of the two questions whether the contract upon which the plaintiffs sue is joint or several, and whether the defendant is a party in the same right to the contract upon which he desires to bring his counter-claim as to that upon which the plaintiffs claim.

SCRUTTON L.J. I agree. In substance the defendant desires to have Vasey joined as a co-defendant with him in the action on the ground that the contract upon which the action is brought was made with himself and Vasey as joint contractors, and not merely with himself alone as a several contractor. He also desires that this should be done in order that he and Vasey may be able to bring a counter-claim against the plaintiffs in respect of a contract which the plaintiffs entered into with them as co-contractors.

The course of legal history in this country no doubt shows that the tendency has been to make the rules of procedure so flexible as to insure as far as possible that trouble shall not be occasioned by objections taken on merely technical grounds. Formerly, when an action was brought upon a joint contract and all the co-contractors were not joined as defendants, the defendant pleaded in abatement alleging the non-joinder of his co-defendants, and under that plea, on its being proved that the contract was joint, there was an abatement of the action, unless the plaintiff agreed to join all

(1) 15 Times L. R. 204.

the joint contractors as co-defendants. The plea in abatement has been abolished by the Judicature Acts and the Rules of the Supreme Court, but the Rules substituted a new procedure under which no cause is to be defeated by reason of the non-joinder of parties, and the Court may in every cause deal with the matter so far as regards the rights and interests of the parties actually before it, and may order that any parties be added who ought to have been joined or who may be necessary parties. In *Kendall* v. *Hamilton* (1) Lord Penzance, in the course of his dissenting judgment, after mentioning that the Judicature Act and the Rules had abolished all objections and defences arising out of the mis-joinder or non-joinder of parties, observed that when the plea in abatement was swept away the legal right of a joint contractor to have the other joint contractor joined in any action brought upon the joint promise was swept away too and the creditor became entitled to sue the parties severally, subject no longer to the will of the defendant, but to the discretion of the Court exercised for the furtherance of justice. Lord Blackburn in the same case (2) went so far as to say that he could not agree with the opinion of Lord Penzance that the Judicature Act had taken away the right of the joint contractor to have the other joint contractor joined as a defendant or had made it a mere matter of discretion in the Court to permit it, and that he himself thought that the right remained though the mode of enforcing it was changed. It seems to me that the Judicature Act and the Rules have undoubtedly given the Court a discretion as to whether or not it will order that the joint contractors be joined as defendants. Thus, for example, where, as in *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (3), the co-contractor is a foreigner resident in another country, the Court in its discretion may decline to order that he be added as a co-defendant, and may allow the action to be tried without him. In *Fardell Traction Haulage Co.* v. *Basset* (4), the Court went even further in the exercise of its discretion, and, being unable at that stage of the proceedings to decide whether or not the contract was in fact joint, held that, as the defendant had made out a reasonable case of joint contract, an order ought to be made joining the alleged joint contractor as a co-defendant, but at the

(1) 4 App. Cas. 532.
(2) Ibid. 544.
(3) [1893] 1 Q. B. 422.
(4) 15 Times L. R. 204.

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risk of the defendant as to costs in case it should appear at the trial that the contract was not joint and that the co-defendant was not liable. As in that case, so here, I think the Court ought to make the order asked for.

Like the other members of the Court, I desire to say that in making the order we are not deciding the question whether or not the contract sued upon was in fact made with the defendant and Vasey jointly, that being a question to be determined at the trial. Neither are we now deciding whether the defendant makes his counter-claim in the same right as that in which he opposes the plaintiffs' claim, that also being a question which must be left open for consideration at the trial. It is also clearly a matter to be dealt with at the hearing what should be the order of procedure in dealing with the questions involved.

If the learned judge in making the order under appeal meant to decide that the Court had no jurisdiction to make an order compelling the plaintiffs to join Vasey as a co-defendant without the consent of the plaintiffs, I think his view was erroneous. If he did go wrong in that respect, I think the probable explanation is that the relevant authorities were not cited to him. They certainly ought to have been brought to his notice, for no judge is called upon to look up for himself all the cases bearing upon every point that arises before him.

Appeal allowed.

The order of the Court, which followed the order in *Fardell Traction Haulage Co.* v. *Basset* (1), was in these terms :—

It is ordered that this appeal be allowed and that the said order of the Hon. Mr. Justice Bray be set aside. It is therefore now ordered that the said S. A. Vasey be joined as a co-defendant in this action and that the defendants be then at liberty to bring a counter-claim jointly against the plaintiffs, and that the plaintiffs are not to be prejudiced by such joinder if it should be held that the contract sued upon was not a joint contract and that the said S. A. Vasey is not liable thereon, and in that case the defendant Fred Griffiths is to pay his co-defendant S. A. Vasey his costs subject to any right of contribution one may have against the other. And it is also

(1) 15 Times L. R. 204.

ordered that the costs of this appeal be taxed by the taxing Master and paid by the plaintiffs to the defendant Fred Griffiths in any event.

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Solicitors for defendant: *G. & W. Webb.*

Solicitors for plaintiffs: *Busk, Mellor & Norris, for Slater, Heelis & Co., Manchester.*

W. J. B.

[IN THE COURT OF APPEAL.]

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LIEBIGS EXTRACT OF MEAT COMPANY, LIMITED *v.* MERSEY DOCKS AND HARBOUR BOARD AND WALTER NELSON & SON, LIMITED.

[1916 L. 760.]

LIVERPOOL DISTRICT REGISTRY.

Harbours and Docks—Mersey Docks and Harbour Board—Discharging Goods from Ship on to Quay—Fitness of Quay to receive Goods—Liability of Dock Board for Negligence—Duty of Master Porters to discharge Ship—Mersey Dock Acts Consolidation Act, 1858 (21 & 22 *Vict. c. xcii.*).

The plaintiffs were the owners of ox hides which arrived on board a general ship at the docks at Liverpool belonging to the Mersey Docks and Harbour Board. The cargo was unloaded on to the quay by master porters, whose duty it was to unload ships in the docks and who were licensed for that purpose by the dock board. The hides were damaged when on the quay owing to some powdered barilla ore, which had been unloaded from a ship on to the same quay a few weeks before, having got into the interstices between the stones forming the flooring of the quay. In an action against the dock board and the master porters to recover damages for the injury to the hides the jury found that the board were negligent in allowing the quay to be used for the hides whilst in its then condition, but that the master porters were not negligent. The board contended that they owed no duty in that respect to the plaintiffs, the duty being imposed by the board's Acts and regulations made under those Acts on the master porters alone:—

Held, that there was nothing in the Acts or regulations which relieved the board from the duty to take reasonable care that the quay was fit to receive the hides, and that therefore the board were liable.

APPLICATION for judgment or a new trial in an action tried before McCardie J. and a special jury at Liverpool.

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The action was brought to recover damages for injury to certain ox hides which were landed at a quay in the docks belonging to the first defendants, the Mersey Docks and Harbour Board, at Liverpool. The second defendants were master porters, who were duly licensed as such by the dock board, and whose duty it was to unload vessels in the docks. The facts, shortly stated, were as follows:— On November 2, 1915, the steamship *Celtic King* arrived at Liverpool from Buenos Aires with a general cargo, part of which consisted of 5000 ox hides consigned to the plaintiffs. She discharged her cargo at a berth in King's Dock belonging to the first defendants, and was given quay space for unloading and dealing with the cargo. The second defendants were the master porters who discharged the cargo. The hides were wet and salted, and during the process of landing them on to the quay and arranging them in piles when there many of the hides came in direct contact with the quay and about 800 were discoloured and seriously injured. It appeared that in the previous October the steamship *Invertay* arrived at the docks from South America with a cargo which included a quantity of copper barilla in the form of powdered ore in bags. She occupied the same berth as was subsequently occupied by the *Celtic King* with the same quay space for landing the cargo. Some of the bags containing the barilla ore had burst, and in consequence a certain amount of the ore was spilt on to the quay and got into the interstices between the stone setts of the quay. The unloading of the *Invertay* was completed on or about October 18. The master porters who discharged her swept up the powdered ore, and the dock board also swept and scraped the quay as usual in the ordinary course of business after the discharge of the cargo. The master porters who discharged the *Celtic King* also swept the quay before the unloading commenced. The latter were not the master porters who had discharged the *Invertay*, and there was no evidence that they knew that barilla ore had been unloaded on to the quay from the *Invertay*. Between the discharge of the *Invertay* and the discharge of the *Celtic King* three other vessels had been discharged at the same berth, and on each occasion the quay had been cleared up by the master porters and swept by the dock board. Some of the barilla ore must have remained in the interstices between the stone setts of the quay, because

admittedly the damage to the hides was caused by their coming in contact with the ore.

The plaintiffs sued the defendants jointly and in the alternative for damages (which were agreed at 181*l.* 18*s.* 1*d.*) for injury to the hides owing to their alleged negligence in not taking reasonable care to see that the quay was in a fit and proper condition to receive the hides, or in not warning the plaintiffs that the quay was not in a fit and proper condition for that purpose.

The defendants in their respective defences (so far as material) denied negligence. The first defendants also alleged, in the alte native, that they owed no duty to the plaintiffs to clean the quay prior to the reception of the hides, it being the duty of the master porter in charge of a vessel's cargo to take precautions to protect the cargo from damage when receiving it upon the quay. These defendants also relied upon the following notice which was posted up in King's Dock where the hides were landed:—"Mersey Docks and Harbour Board. Notice. All goods laid down on or passing over the quays of the docks of this board are at the owner's sole risk in every respect. The board have no custody of such goods and will not be responsible for loss or damage by fire, theft, weather, or otherwise howsoever."

The learned judge left certain questions to the jury, which with the answers thereto were as follows:—"(1.) Was the quay reasonably fit to receive the hides in question?—No. (2.) Were the defendant board guilty of negligence (*a*) in allowing the quay to be used for the hides whilst in the condition alleged?—Yes; (*b*) in not giving the master porters notice that the quay was recently used for copper barilla?—Yes. (3.) Were the plaintiffs by themselves or their agents, Messrs. Gordon, aware of the notice?—No. (4.) Did the plaintiffs by themselves or their agents, Messrs. Gordon, assent to the terms of the notice exhibited by the defendants as a term of the dealings between the plaintiffs and defendants?—No. (5.) If the plaintiffs or their agents were not aware of the notice, did the defendants take all (1) reasonable steps to make it known to those dealing with them that they only received goods on the quay on terms of owner's sole risk?—No. (6.) Were the defendants,

(1) The word "all" was in the question set out in the judgment as drawn up, but was not in the shorthand notes.

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Messrs. Nelson, guilty of negligence (*a*) in not making the surface of the quay fit for the hides ?—No ; (*b*) in their dealing with the hides —No." Upon these findings the learned judge entered judgment for the defendants Walter Nelson & Son, Limited, and reserved the case against the dock board for further consideration.

1917. May 4. McCARDIE J. read the follow ingjudgment :—This action was tried before a special jury and myself at the Liverpool Assizes. The jury found their verdict against the Mersey Docks and Harbour Board (hereinafter called the board), but they exonerated the second defendants (hereinafter called Nelsons) from blame.

Points of law arose at the trial and the arguments thereon were concluded yesterday before me in London. I think it better to give judgment before I leave for circuit, although I should have desired further time for consideration.

The plaintiffs are the manufacturers of Liebigs Extract of Meat. They import largely from South America. They claim damages against the defendants for breach of duty and negligence. The undisputed facts may be briefly summarized as follows: The defendant board are the owners and occupiers of the docks and quays at Liverpool. The defendants Nelsons are master porters duly licensed by the board to act as such at the said docks. In October, 1915, the steamship *Invertay* arrived at the docks from South America. She occupied berth 14 in No. 1 King's Dock. To the berth there was given a proper space of quay for unloading and dealing with the goods from the ship. Her cargo included a very large quantity of copper barilla in the form of powdered ore. This powder was taken from the ship and was placed on the said space of quay. In the course of the operations some of the bags containing the ore broke, with the result that the quay space and/or the interstices therein were left with a scattering of the powder thereon or therein. This powder was never removed. The unloading of the powder from the ship was completed on or about October 18.

On November 2, 1915, the steamship *Celtic King* arrived at Liverpool. She carried (inter alia) a cargo of 5000 ox hides for the plaintiffs which had been shipped at Buenos Aires. She occupied

the same berth in No. 1 King's Dock, and she was given the same space of quay as had been used by the *Invertay*. The hides were wet and salted. In the ordinary course of operations the hides were placed on the quay and were inspected, arranged and weighed. Many of the hides came into direct contact with the surface of the quay. As a result they attracted and absorbed the powdered ore. Serious discoloration took place and the goods were greatly damaged. About 800 hides in all were injured, of which about half were seriously injured and half less seriously. The plaintiffs claim damages against the defendant board on two grounds—namely, (*a*) for a breach of warranty that the quay was reasonably fit to receive the hides, and (*b*) for negligence. As against Nelsons they claim for damages for negligence in the performance of their duties.

The jury, as I have said, found in favour of Nelsons, and as against the board they found (1.) that the quay was not reasonably fit to receive the hides in question; (2.) that the board were guilty of negligence (*a*) in allowing the quay to be used for the hides whilst in the condition I have stated, and (*b*) in not giving Nelsons (as the master porters) notice that the quay had recently been used for the purpose of dealing with the said powdered ore.

Upon the hearing before me it was ably argued by Mr. Atkinson for the board that judgment should be entered in his clients' favour by reason of the particular statutory provisions which govern the operations of the board. In the course of the argument it was conceded that, apart from such statutory provision, the board must be taken to warrant that the quay was reasonably fit for the purpose of receiving the hides to be dealt with in the ordinary course of business. I deem it, however, right to say, in spite of such concession, that I have some doubt, apart from the question of the said statutory provision, as to the nature and extent of the implied warranty which might arise in the circumstances of this case having regard to the character and extent of the defendants' powers and duties. The grounds for my doubt will appear from a consideration of the following decisions: *The Moorcock* (1); *The Bearn* (2); *Bede Steamship Co.* v. *River Wear Commissioners* (3); *The Ella* (4);

(1) (1889) 14 P. D. 64, 68.
(2) [1906] P. 48.
(3) [1907] 1 K. B. 310.
(4) [1915] P. 111.

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and *The Lancastrian* (1), affirmed by the Court of Appeal. (2) See, too, the observations of Lord Reading in *Pyman Steamship Co.* v. *Hull and Barnsley Ry. Co.* (3) In my judgment just delivered in the case of *Maclenan* v. *Segar* (4) I have discussed and applied the principle of *Francis* v. *Cockrell.* (5) Apart from the particular statutory provisions in question in this particular case, it is in my view well worthy of argument whether the principle of *Francis* v. *Cockrell* (5) should not be applied in its entirety to the case of the occupiers of docks and quays who invite third persons to use for reward the facilities provided for ships and goods. The authorities I have cited show that the point still exists for determination in such a case as the present. I myself see no good reason for the non-application in such cases as the present of the principle of *Francis* v. *Cockrell.* (5) So to apply it would tend to the simplification of law and would give a useful working rule.

Now the substance of the board's contention in the present case was that the statutory provisions which govern and limit the defendant board show that although the board may be responsible for injuries which arise from a structural defect or a lack of repair in the premises which they invite the parties to use, yet they are not responsible for such a defective state of the quay as here existed. The quay, it is admitted, was properly built. It was in a good state of repair. The defect was due to a lack of proper sweeping and cleansing prior to the reception of the hides. That defect, the board assert, arose from the default of the master porters, and the board say that they owe no duty to the plaintiffs with respect to the preparation of the quay for the reception of particular goods. It is argued by the board that the master porter had an independent status with specific rights and specific duties, and that upon him, and not upon the board, fell the duty in the present case of making the quay fit for the reception of the hides in question.

Many Acts have been passed with respect to the Liverpool docks. They commence in the reign of Queen Anne. These earlier statutes are referred to by Blackburn J. in his well-known opinion in *Mersey*

(1) (1915) 32 Times L. R. 117.
(2) (1916) 32 Times L. R. 655.
(3) [1915] 2 K. B. 729, 731.
(4) [1917] 2 K. B. 325.
(5) (1870) L. R. 5 Q. B. 501.

Docks and Harbour Board v. *Gibbs*. (1) The following passages from the opinion of Blackburn J. are of the greatest importance. He says (2): "Now, it is obvious that a shipowner who pays dock rates for the use of the dock, or the owner of goods who pays warehouse rates for the use of a warehouse and the services of the warehousemen, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid. It is well observed by Mr. Justice Mellor, in *Coe* v. *Wise* (3), of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works." That opinion was approved and acted upon by the House of Lords in deciding the above case. In 1857 and 1858 consolidating and amending Acts were passed (see Mersey Docks and Harbour Act, 1857 (20 & 21 Vict. c. clxii.), and Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.)), and those Acts, together with a short late Act passed in 1861 (see Mersey Docks (Corporation Purchase) Act, 1861 (24 & 25 Vict. c. clxxxviii.)), contain the whole law relevant to the present case. The Mersey Docks and Harbour Act, 1900 (63 & 64 Vict. c. lxviii.), does not affect the point in question, for, although it repeals s. 54 of the Act of 1858, it re-enacts (in substance) the section so far as it is now material (see s. 3 of the Act of 1900). I have considered the above relevant statutory provisions, and in my view there is no ground for thinking that the general duty, as stated by Blackburn J., is destroyed or in any way

(1) (1866) L. R. 1 H. L. 93, 104 et seq.
(2) Ibid. 107.
(3) (1864) 5 B. & S. 440, 453; 4 N. R. 352, 354.

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diminished. The scheme is the same though the details are altered here and there.

By s. 54 of the Act of 1858 (re-enacted in substance by s. 3 of the Act of 1900) the dock-master or harbour-master may regulate the position, loading, and discharging of any vessel, and apportion the space of quay which each vessel may use in the docks. By s. 80 of the Act the exclusive jurisdiction and management of the quays is vested in the board and shall not be interfered with by any person whatsoever. By s. 81 of the Act the board may pave and repair their quays. By s. 165 the board may erect transit sheds and shall keep all such transit sheds and conveniences in good repair. By s. 221 the board may make by-laws for regulating and managing their quays. The defendant board are thus in full control. No one can cleanse or sweep the quays save by their leave. Their authority is complete and their discretion is full. I am unable to find any provision whatever which gives a master porter a right, in the absence of express or implied permission by the board, to cleanse, sweep, and purify any part of any quay. Moreover, the space of quay to be utilized by each ship is in the full discretion of the servants of the board (see s. 54).

Now prior to 1857 the trade and status of master porters were well known in Liverpool. They were expressly recognized by the defendants' Act of 1846 (see 9 & 10 Vict. c. cix., s. 35). The Act of 1858 contains several sections referring to them. By s. 32 the board may appoint (inter alios) master porters; but the master porter is not a servant of the board. That, I think, is clear from the various provisions of the Act. He receives a licence only to act as a master porter. He gets no salary or wages from the board. He may appeal to the Board of Trade against any decision or suspension of his licence (see s. 19 of the Act of 1861). By s. 35 of the Act of 1858 a cargo can be dealt with by one set of porters only who shall be in the employ and under the orders of a master porter. By s. 36 of that Act a master porter must give a bond for the due performance of his duty (see also s. 12 of the Act of 1861). Sects. 41, 42, and 43 also refer to master porters. It appears from s. 44 that the board cannot themselves unload cargo save in certain specific circumstances. I therefore think that Mr. Atkinson is right in his contention that the master porters possess a definite status with definite privileges and

duties. But I am unable to find any provision either in the Acts or in the by-laws which places on the master porters any statutory duty of cleansing and preparing the quay for the proper reception of arriving goods, or of making it fit and safe in respect of such goods, although a common law duty of care of course exists against the master porters in favour of the owners of the goods. Still less can it be said that the Acts indicate that such a duty is placed on the master porters to the exclusion of any duty in respect thereof by the board. It is worthy of remark that No. 7 of the defendants' by-laws mentions many matters to be performed by the master porters; but the cleansing and preparation of the quay for the reception of goods is not enumerated amongst such matters. By s. 86 of the Act of 1858 it is (in substance) provided that a penalty shall be imposed upon persons who deposit dust, refuse, and the like upon the quays of the defendant board. By s. 88 of that Act it is (in substance) provided that every owner, consignee, or other person shall remove within forty-eight hours the goods or any other matter or thing which he has deposited on the quay under pain of a penalty. It was contended by the board that those sections relieved the board from responsibility in the present case, for it was argued that the Acts of Parliament put the duty of removal of such a thing as the powdered ore in question upon other persons. It is a matter of doubt whether the residue of powdered ore here left falls within either of the sections, But it may well do so. In my view, however, the above sections .were enacted not in order to free the board from responsibility for the state of their quays, but in order to aid them in their duty of keeping the quays in a fit and proper state for use of arriving goods.

I need not analyse in detail the somewhat intricate evidence in the case. The special jury followed it with great attention and full appreciation. It was not seriously disputed that the quay was unfit to receive the hides in question. The defendants, however, vigorously contested the allegation of negligence, but the jury found against them. In my opinion there was ample evidence to support the finding. If the warranty I have referred to existed (as was conceded by defendants' counsel, subject to the point of the statutory provisions I have discussed), then it was clearly broken. If the defendants owed to the plaintiffs the duty of care with respect

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to the matter complained of, then the jury have found that a breach of duty was committed. I am satisfied, in spite of the able arguments of Mr. Atkinson and Mr. Maxwell, that the Acts of Parliament do not relieve the defendant board from the duty of care with respect to the fitness of the quay, nor do they preclude the implication of the warranty which has been relied upon by the plaintiffs in this case. There must be judgment for the plaintiffs against the board for 181*l.* 18*s.* 1*d.*

The Mersey Docks and Harbour Board appealed.

Cyril Atkinson, K.C., and *A. H. Maxwell*, for the appellants, contended that the master porters, who alone did the work of loading and discharging vessels in the appellants' docks at Liverpool, had an independent status and were not servants of the dock board, and that under the dock board's Acts the duty of taking reasonable care that the quay was fit to receive goods was imposed on the master porters and not upon the dock board, all responsibility in respect of goods being placed on the master porters. They referred upon this point to the Mersey Docks and Harbour Act, 1857, which constituted the Mersey Docks and Harbour Board, and to the relevant sections in the Mersey Dock Acts Consolidation Act, 1858, and to the by-laws made thereunder. They further contended that if there was a duty upon the appellants, it was a duty to take reasonable care to see that the quay was fit to receive goods (1), and that there was no evidence of any neglect of that duty; and, further, that the learned judge had misdirected the jury upon this point.

Langdon, K.C., and *G. D. Keogh*, for the plaintiffs.

Greer, K.C., and *Greaves Lord*, for the second defendants.

Cur. adv. vult.

1918. April 22. PICKFORD L.J. read the following judgment:— In this case the plaintiffs sued the defendant board and the other

(1) During the course of the arguments in the Court of Appeal counsel for the appellants stated that McCardie J. was under a misapprehension when he said in his judgment that it was "conceded" that, apart from statutory provision, "the board must be taken to warrant that the quay was reasonably fit for the purpose of receiving the hides to be dealt with in the ordinary course of business."

defendants for damage occasioned to wet hides discharged from a vessel called the *Celtic King* upon a quay belonging to the Mersey Docks and Harbour Board by the other defendants who were acting as master porters in the discharge of the vessel. The damage was caused by the presence of some barilla ore upon the quay which was drawn up by salt spread there during the discharge and thereby brought into contact with the hides as they were dragged over or piled on the quay. The plaintiffs alleged that both the defendants were, or in the alternative one of them was, liable. Certain questions were left to the jury which they answered against the Mersey Docks and Harbour Board and in favour of the other defendants, and judgment was entered accordingly. The facts under which the damage took place were as follows: [The Lord Justice stated them.] The plaintiffs alleged that the barilla ore was allowed to remain on the quay by the negligence of both defendants or of one of them. The Mersey Docks and Harbour Board raised the defences: (1.) That they were under no obligation to the plaintiffs to take any steps to sweep or clear up the quay or in any way to make it fit for the reception of the plaintiffs' cargo; (2.) that if there were any such duty, they had discharged it by taking reasonable steps to make the quay fit.

The first question to be determined is therefore whether the Mersey Docks and Harbour Board were under any, and if so what, obligations to the plaintiffs. They are entitled by their Acts to maintain docks, sheds, and quays, and to make charges to vessels that use them. I will assume that they are not bound to receive all vessels that come, but vessels come by their invitation, and therefore they are, in my opinion, under an obligation to take reasonable care that the docks, quays and sheds are reasonably fit for the use of those whom they invite. I think this is the result of the cases of *Parnaby* v. *Lancaster Canal Co.* (1) and *Mersey Docks and Harbour Board* v. *Gibbs.* (2) The latter case was decided on Acts before the Acts now governing the Mersey Docks and Harbour Board were passed, but I think the result of the present legislation is the same; see also *The Bearn.* (3) It was, however, argued that this obligation did not exist in this case because of the legislation as to master

(1) (1839) 11 Ad. & E. 223, 230. (2) L. R. 1 H. L. 93, 104.
(3) [1906] P. 48.

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porters contained in the Mersey Dock Acts Consolidation Act of 1858 and the amending Acts. I do not think this legislation has any such effect. By the statutes and by regulations authorized by those statutes certain duties are cast upon the master porters, but there is nothing, in my opinion, which relieves the Mersey Docks and Harbour Board from the obligation which I have stated.

I am not sure that McCardie J. in some parts of his summing-up, and especially in his judgment given after the verdict, was not inclined to put the obligation higher and to say that the Mersey Docks and Harbour Board warranted that the quay was fit for the plaintiffs' use. If so, I cannot agree with him, and think the obligation is as I have stated it—to take reasonable care that it shall be fit. This was, I think, the main point of the defence, but it was also alleged that, whether there were such obligation or not, the Mersey Docks and Harbour Board had in fact taken reasonable care to make the quay fit.

It is clear that the Mersey Docks and Harbour Board's contention that they were under no duty to the plaintiffs raised difficulties in the way of their convincing the jury that they had nevertheless discharged that duty, and I think the jury should have had a careful direction on the point. The question for them seems to me to have been this: Did these defendants take reasonable care to make the quay fit for the use of it by the plaintiffs? (I do not say that it need be left in these exact words.) In this case the questions were: "(1.) Was the quay reasonably fit to receive the hides in question?" And the answer was "No." "(2.) Were the defendant board guilty of negligence (*a*) in allowing the quay to be used for the hides whilst in the condition alleged?" Answer: "Yes." "(*b*) In not giving the master porters notice that the quay was recently used for copper barilla?" Answer: "Yes." I see no objection to the first, though it was perhaps hardly necessary, as it was admitted that ore from the quay damaged the hides. I think the form of the second is unfortunate, but if it means, Were the defendants negligent in allowing the quay to be used for the hides because they did not take reasonable care to make it fit? it would raise the real question. The third question is hardly appropriate to this case, and is probably taken from *The Moorcock* (1), where the defendants had not the power of

(1) 14 P. D. 64.

remedying the defect. Here the Mersey Docks and Harbour Board's duty was to take such steps as were reasonable to make the quay fit, and the question of warning would only arise if they had failed by reasonable care to make it fit, and still knew, or ought to have known, it was unfit. It did not, however, in my opinion, do any harm, and the serious difficulty arises on the second question. This, with the other questions, was submitted to the counsel for the Mersey Docks and Harbour Board and not objected to by them, and I assume, therefore, they considered that it raised the real question. In considering whether reasonable care had been taken it seems to me there were several things to be considered as to the practice of the docks and the knowledge that ought to be imputed to the officials of the Mersey Docks and Harbour Board. A matter for consideration is whether the dock board knew, or ought to have known, that the combination of barilla ore and hides was dangerous, and that it was likely to occur. It would then remain to determine after considering these matters at least whether what the dock board did satisfied the obligation of taking reasonable care. [The Lord Justice referred to the evidence.] I do not think that any of these matters, all of which are in my opinion relevant to the question before the jury, was explained to them as it should have been, and I have had great doubt whether in the circumstances the verdict was not so unsatisfactory as to make it necessary to direct a new trial, but I have come to the conclusion, not without great hesitation, that, considering the course which the trial took and the acceptance of the questions by the dock board, it is not sufficiently established that a substantial miscarriage of justice has arisen from the defects in the summing-up.

There is also another question, i.e., whether the dock board are protected from liability by reason of a notice which they posted on or near the quay where the discharge took place. This notice was an extension of the exemption from liability arising from certain causes which is granted to them by s. 350 of the Consolidation Act, 1858, to an exemption from liability from all causes. The questions left to the jury on this point were as follows: [The Lord Justice read questions 3, 4, and 5, and the answers thereto.] The objection on this part of the case is that the third of these questions, coupled with some remarks in the summing-up, placed too great an obligation

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upon the dock board and led the jury to believe that if one reasonable step were omitted they would be liable, although the steps in fact taken were reasonably sufficient. I think it would have been more satisfactory if the question had been left in the form approved by the House of Lords in *Richardson, Spence & Co.* v. *Rowntree* (1), but I do not think there is any reason to suppose that the jury were misled in any way, and there was clearly plenty of evidence upon which they could find as they did.

The result is that the appeal fails and must be dismissed with costs.

WARRINGTON L.J. read the following judgment:—Between November 5 and 11, 1915, there were discharged from a ship called the *Celtic King* upon a quay in one of the docks of the defendants the Mersey Docks and Harbour Board certain wet salt hides consigned to the plaintiffs; the defendants Walter Nelson & Son, Limited, were the master porters employed to effect the discharge. The hides were discharged in the customary manner, and some of them came in contact with the quay. There happened to be on the surface of the quay, or in the interstices between the stones forming the surface, a certain quantity of copper ore in the form of fine powder known as barilla powder. As the result, apparently, of some chemical reaction between the copper and the salt some of the hides were discoloured and sustained considerable damage. This action was brought by the plaintiffs to recover damages from both defendants for negligence. It was tried before McCardie J. and a special jury at Liverpool, and resulted in a verdict and judgment against the dock board and in favour of the master porters. The dock board appealed to this Court asking for a judgment in their favour, or alternatively for a new trial. The appellants' case, as really pressed in this Court, resolved itself into an application for a new trial on the ground of misdirection. [The Lord Justice referred shortly to the facts.]

The dock board contended that they owed no duty to the plaintiffs in reference to the condition of the surface of the quay and sought to throw the responsibility entirely on the master porters. The learned udge has held, as a matter of law, that they did owe such a duty to

(1) [1894] A. C. 217.

the plaintiffs, and I agree with him in this view. In my opinion it was their duty to take reasonable care that the hides should not be exposed to risk of damage arising from the condition of the quay. What they ought to do in the particular case would depend upon the circumstances in fact known to the board or their servants, or which would have become known to them if they had made reasonable use of the means of knowledge in their power. It may be that the master porters also owed to the plaintiffs a duty to take reasonable care that the cargo they had to discharge should not be exposed to danger from the condition of the quay, but this fact would not restrict the primary duty of the dock board as explained above. Unfortunately a large part of the board's case consisted in an attempt to cast such duty as there was exclusively on the master porters, and I cannot but think that this has somewhat confused the issue and caused some of the difficulty of the case. I am bound to say, however, that, with all respect to the learned judge, I think the difficulty has been caused mainly by a certain want of precision in the mode in which the duty of the board was as a matter of law explained to the jury and by the form in which the questions affecting the board were put to them. [The Lord Justice referred to a passage on p. 8 of the transcript of the shorthand note where the learned judge asked the jury to assume that the board had a duty to fulfil towards the owners of the cargo to take reasonable care when they allowed the quay to be used for the hides after the barilla powder had been on it; and said that so far the learned judge properly directed the jury.] The passage in the summing-up which was most strongly insisted on by the board as amounting to a misdirection was the following: "In the circumstances you will ask yourselves this: The traffic manager being there, and the traffic manager knowing or being able to know that barilla powder had been upon the quay there, are the board or are they not guilty of negligence in allowing that quay to be used when they might have taken the requisite steps to remove every trace of barilla powder and make it safe, so that that piece of quay could be employed by wet hides without damage or risk"? It is said that this would lead the jury to the conclusion that the board in effect warranted the quay free from every trace of barilla powder, so that the mere presence of such powder in fact would have rendered the board liable. There is in

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my opinion no ground for holding that any such warranty existed, and if, looking at the summing-up as a whole, I thought the learned judge led the jury to the opposite conclusion, I should say there would be a clear misdirection. The judgment was pronounced on a day subsequent to the trial, and there are certainly some expressions therein which lend colour to the view that the learned judge really intended to hold that there was such a warranty, but on the whole I think all he meant was that the board must be held to have undertaken to take and warranted that they had taken such reasonable care as is mentioned above. Such a view amounts to nothing more than that it was their duty to take such care, and that a failure so to do would be a breach of it and expose them to an action for damages. It is unfortunate that the learned judge used the expression " warranty " at all, for there is a clear distinction between a warranty that a thing is so and an obligation to take reasonable care to make it so ; but I cannot think that he really intended to hold that there was a warranty in the proper sense, nor is there anything in the summing-up by itself which goes anything like so far in this direction as some of the expressions in the judgment, and it was of course the summing-up only which was heard by the jury. The passage I have read, taken by itself and read literally, certainly seems to place the duty of the board too high. It was not their duty to take the requisite steps to remove every trace of barilla powder, but only such steps as under the circumstances were reasonable in order to avoid danger to the hides. But the jury heard the whole of the summing-up, including the passage already referred to at p. 8 of the transcript, and I think they would have understood from this and other parts thereof, and particularly those in which the judge discusses the actual or imputed knowledge of the board, that the expressions in questions must be taken in a fair business sense as casting upon the board a duty to take only such reasonable steps as were sufficient to attain the object in view. For this reason, although, as I have said, I think there was a lack of precision in the summing-up, I cannot say that it was so clearly calculated to mislead the jury as to amount to a misdirection in point of law, or to have resulted in a serious miscarriage of justice.

There remains to be considered the form in which the questions were left to the jury. The first two were as follows : [The Lord

Justice read the questions and answers.] No objection was raised at the time by counsel for the board to the form of the questions, but if it were really wrong I do not think this would now stand in their way. The first question is not open to objection, nor can the verdict thereon be impeached; it was clearly right. What is said is that the jury may have thought that the second question meant that if the quay was in fact in an improper condition the mere fact that the board allowed it to be used was negligence in point of law. For much the same reasons as I have explained above I do not think the jury would have properly come to that conclusion, for it must, I think, have been clear to them that if that were the meaning the question need not have been put at all. I think they ought to have inferred from the summing-up that the negligence, if any, consisted in the failure to take proper care to avoid danger before allowing the quay to be used. I think, therefore, though with some hesitation, that there are no sufficient grounds for granting a new trial on the ground of misdirection in reference to the position of the dock board. There was, in my opinion, evidence on which the jury might properly give the verdict they did. I think there was some evidence that the board through their servants had the means of knowing that the barilla powder had been spilt on the quay, and that the hides might be injured if they should come in contact with it, and that there were precautions which might reasonably have been taken to avoid the danger.

This, however, does not entirely dispose of the appeal. The board relied on a notice exhibited in the docks to the effect that they would not be responsible for damage to goods laid down on or passing over the quays as protecting them against the plaintiffs' claim. In reference to this part of the case, one of the questions left to the jury, as stated in the judgment drawn up, was: [The Lord Justice read question 5 and the answer.] It is objected that the jury might have thought that the omission of any one reasonable step would justify their answer, and that the question over-stated the burden cast on the defendants if they sought to rely on the notice. It is said, and I think rightly, that this burden was limited to that of taking steps reasonably sufficient for the purpose. The word "all" does not appear in the question as set out in the shorthand notes, and there is therefore some doubt as to the form submitted to the

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jury. But assuming it was in the form set out in the judgment, and that such form was improper, there was, in my opinion, ample evidence to support an answer to a question in the proper form, and I do not think we ought to order a new trial on this ground.

On the whole, then, I think this appeal fails and ought to be dismissed.

SCRUTTON L.J. read the following judgment :—Liebigs Company, Limited, whom I call " the goods owners," sued the Mersey Docks and Harbour Board, whom I call the " dock owners," and Walter Nelson & Son, Limited, whom I call " the master porters," for damage done to certain wet hides discharged on the premises of the dock owners by the master porters, and alleged to be injured by the negligence of one or both of the defendants. The jury answered certain questions, and on their answers McCardie J. entered judgment for the plaintiffs against the dock owners, and for the master porters against the plaintiffs. The dock owners appeal on the grounds that there was no evidence that they had broken any duty owed to the goods owners, and that the learned judge had misdirected or insufficiently directed the jury. [The Lord Justice stated the facts.] The jury must have taken the view that it was not obvious at the discharge to any person skilled in discharging goods that barilla powder was on or in the surface of the quay, as they have found the master porters not guilty of any negligence in discharging wet hides on to the quay ; and it is probable that the ore was trodden or dried into the earth and drawn up by the wet salt contained in and discharged with the hides.

The first question is, What is in law the duty of the dock owners as to the condition of their quays ? Counsel for the dock owners appear to have argued, or some of the dock witnesses appear to have stated, that they had no duty at all, even if they knew the quay was dangerous to the cargo about to be discharged on it; or at any rate, their duty was only to do rough cleaning, leaving any special precautions for special cargo to the master porters, who by the peculiar practice of Liverpool do all the discharging of cargo. In my view the duty of the board is determined in a general way by the decision of the House of Lords in *Mersey Docks and Harbour Board* v.

Gibbs (1), although that decision was given on Acts other than those at present in force. The board are empowered by s. 230 of the Mersey Dock Acts Consolidation Act, 1858, to take tonnage rates on ships using their docks, and by s. 234 to take dues in respect of goods " brought into the docks or landed at or deposited upon or carried over any quay . . . . or land belonging to the board." By s. 82 they may erect and " make reasonable charges for the use of " sheds for the reception of goods; and by s. 170 may make charges for the use of transit sheds. The Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), is not incorporated in the Mersey Acts, and we were not referred to any section in those Acts similar to s. 33 of the Harbours, &c., Clauses Act, which gives the public a right to use the quay for the unshipping of goods on payment of the rates sanctioned by the Acts. The dock board therefore invite persons to use their quays, though they are not bound to allow them to do so, and take payment for the accommodation they provide. Under these circumstances, unless there is something in the Acts now in force, or the circumstances of this case, which makes the liability different, the liability of the board is as stated by the Exchequer Chamber in *Parnaby* v. *Lancaster Canal Co.* (2): " A duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." This obligation was approved and restated by Blackburn J., giving the opinion of the judges to the House of Lords in *Mersey Docks and Harbour Board* v. *Gibbs* (3) (decided on facts arising before the present consolidation Act of the Mersey Docks), as " a duty to take reasonable care that the dock and its entrance were in such a state that those who navigate it may do so without danger . . . . If they, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty, and did not take reasonable care that it was fit." When one is considering the exact degree of reasonable care that is required in the implied duty arising from receiving payment for accommodation provided, the standard of

(1) L. R. 1 H. L. 93. (2) 11 Ad. & E. 223, 243.
(3) L. R. 1 H. L. 104.

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duty may vary with the subject-matter, and does vary enormously in the decisions of the Courts. In a contract of carriage of goods by sea there is an implied warranty not merely that reasonable care has been used to make the ship fit to carry those goods, but that the ship is actually fit, including freedom from latent defects: *Steel* v. *State Line Steamship Co.* (1) But in a contract for carriage of passengers by land the implied warranty is only to take due care, skill, and foresight to carry safely, and the land carrier does not therefore warrant his conveyance fit in all respects and free from latent defects: *Readhead* v. *Midland Ry. Co.* (2) A person who lets an unfurnished house does not at common law warrant it fit for habitation at all. And in docks and quays the nature of the implied duty must vary with the subject-matter. When the dues were for lying alongside the defendant's wharf on ground not owned by the defendant, which he could not repair, the implied term was that he had used reasonable care to examine the berth to see that it was fit, or that if he had not he should warn the shipowner that he did not know the condition of the berth: *The Moorcock.* (3) The dock or wharf owner's obligation to use reasonable care would not extend to matters of which the shipowner knew and the dock owner did not, as some peculiar construction of the ship requiring a special kind of berth, or some peculiar character of the goods requiring special accommodation, unless the goods were of such a character that a person carrying on the trade of dock owner knew, or ought to have known, their character. It would, I think, follow that, in judging whether reasonable care had been used, there should be taken into account any course of business showing that certain ordinary precautions were customarily taken by a servant of the goods owner, such as the master porter, rather than by the dock owner; and, again, whether the necessity for those precautions depended on knowledge which the dock owner had, or ought to have had, and the goods owner had not, in which case the duty to take reasonable care might be a duty to warn of the danger of which one party knew and the other was ignorant. It will be seen that a summing-up to the jury of such a question must include in the first place a clear statement of the obligation of the dock owner and the question the

(1) (1877) 3 App. Cas. 72. (2) (1869) L. R. 4 Q. B. 379, 381.
(3) 14 P. D. 64.

jury had to decide; secondly, a detailed explanation of the bearing of the evidence on that question in the various stages of the history of the case.

McCardie J. seems to have taken the view that the dock owners "warranted that the quay was reasonably fit to receive hides to be dealt with in the ordinary course of business." Indeed, he twice states this was "conceded." Counsel for the dock owners assured us the learned judge was mistaken in thinking this was conceded, and it would have been odd if counsel, who were arguing that their liability was less than was stated in *Mersey Docks and Harbour Board* v. *Gibbs* (1), should have admitted it was greater. The learned judge seems to have founded his view on the case of *Francis* v. *Cockrell* (2), a case about a racing grand stand, which apparently he had just been considering in another case relating, we were told, to hotel accommodation. (3) But the obligation there stated is the same as in *Readhead* v. *Midland Ry. Co.* (4), a warranty that the premises are fit, except in the case of latent defects which cannot be discovered by reasonable care and skill; that is, to use reasonable care and skill to make them fit, not absolutely to warrant they are fit. I do not find this distinction appreciated either in the summing-up or in the judgment below; it should have been clearly stated to the jury and the facts as bearing on it carefully explained. This, as I respectfully think, erroneous view of the dock board's liability colours the whole summing-up. [The Lord Justice referred to certain passages in the summing-up.] The jury should have been asked, in my view, in one or more questions to deal with a position which may be thus stated: "Having regard to the position at Liverpool of the master porter and the work customarily done by him, did the dock board use reasonable care to see that the quay was fit for the cargo which they knew, or ought to have known, might be delivered from the *Celtic King*, so that damage should not be caused to that cargo by the condition of the quay?" This question would need careful explanation as to its bearing at several stages of the history. First, did the board know, or ought they with reasonable care to have

(1) L. R. 1 H. L. 93.
(2) L. R. 5 Q. B. 501.
(3) *Maclenan* v. *Segar* [1917] 2 K. B. 325.
(4) L. R. 4 Q. B. 379.

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known, that barilla ore had been landed on this quay under such circumstances that some ore might be left there? [The Lord Justice referred to the evidence and said that he found very little explanation in the summing-up of this stage of the case.] The second stage is involved in answering the question Did the dock board know, or ought they with reasonable care to have known, that wet hides were going to be discharged on this quay, where there was barilla. To answer "Yes" to this question imposes a serious burden on the dock board, and the matter should be carefully explained to the jury. A ship comes in carrying general cargo; is it necessary for the dock board first to go through the manifest so as to get particulars of the general cargo? secondly, to look back at the previous history of the berth to see whether within some unascertained time previously cargo has been discharged at that berth which may be dangerous, if it remains, to any item of the general cargo? and, thirdly, to investigate whether the first source of danger has been removed or give warning of its possible presence? This, at any rate, should be carefully explained to the jury. [The Lord Justice said that the learned judge dealt with it very summarily.] The third stage would be, Did the dock board know, or ought they with reasonable care to have known, that barilla ore if on the floor of the quay would be dangerous to wet hides? [The Lord Justice said that here again the learned judge dealt with the matter summarily.] Lastly comes the question whether, if the board ought to have known that barilla ore was on the floor, and wet hides were coming, and barilla might damage wet hides, they took reasonable steps to prevent damage to the hides from the barilla, having regard to the practice as to the master porter's share of the work. Now, if the first three stages above stated were found to exist, I think it would be clear that, unless the condition was visible to the master porter, the board should warn him of a matter affecting their premises and his work, which they knew and he did not; and I can quite understand the jury's finding on this point, if the other conditions were satisfied, that the board should have warned the master porter. The difficulty I have is in the very inadequate explanation given to the jury, first, of the duty of the board to take reasonable care, with the explanation of negligence as so great a departure from reasonable care that the jury think it not merely

an error of judgment, but culpable as a breach of duty; second, of the first three stages as above set out, which must be established before the alternative of taking precautions, or warning the master porter to take precautions, arises.

I entirely agree with the view that the Court of Appeal should not be too microscopic or exacting in its criticism of extemporary summings-up delivered without time for preparation, and should not cavil about details so long as the summing-up is right in substance; and I am fully alive to the extreme probability that a Liverpool jury properly directed may still find for the goods owners. But I have with regret come to the conclusion that this summing-up is so inaccurate in its statement of liability or duty, and so inadequate in its statement of the considerations by which it must be determined whether there has been a breach of duty, that if the dock board desire to take the opinion of another jury with a proper direction they are entitled to have that opportunity.

Another objection to the summing-up is supported in this way: Sect. 350 of the Act of 1858 is as follows: "The Board shall not under any circumstances, or in any case whatever, be answerable or accountable for or be liable to make good any loss or damage which may happen to any goods, or to any vessel, or to any property of any description by fire, storm, or tempest, or from any civil commotion, or by the act of the Queen's enemies, or other inevitable accident." The dock board, not content with this, have posted a large notice in their sheds in the following terms. [The Lord Justice read the notice.] It will be seen that the notice, without saying in plain terms it is doing so, extends the Act by translating "any civil commotion, the act of the Queen's enemies, or other inevitable accident" into "theft . . . . or otherwise howsoever." The dock board pleaded the notice as a defence to the action. The jury were asked: [The Lord Justice read questions 3, 4, and 5 and the answers.] It will be noticed that question 5 is worded "all reasonable steps," and the summing-up repeats this language. I think it was a pity the question was framed and explained in this way, as it might lead the jury to think that reasonable steps were not taken unless every possible step that was reasonable was taken. But I do not think on this head there has been any substantial miscarriage. The dock board are trying to make a contract with goods owners,

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altering their statutory exemption in their favour by increasing it. They have not given any notice of it in the book of rates, the recognized source of information to persons dealing with docks. They have put up a notice on the quay, where the goods owner or his agent for contractual purposes may never come. The master porter is not an agent of the goods owner to make contracts. On this part of the case I should have no hesitation in upholding the finding of the jury, though I think the summing-up might have been much better expressed.

On the main point, however, I have come to the opinion that the verdict and judgment should be set aside and a new trial ordered. My brothers take the opposite view, so the verdict and judgment will stand, but I think the parties have a right to know my opinion.

Appeal dismissed.

Solicitors for plaintiffs: *Alfred Bright & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for first defendants: *Rawle, Johnstone & Co., for W. Calthrop Thorne, Liverpool.*

Solicitors for second defendants: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

W. F. B.

COPARTNERSHIP FARMS *v.* HARVEY-SMITH.

[1917 C. 1102.]

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May 8.

Slander—Military Local Tribunal—Judicial Body—Absolute Privilege—National Registration Act, 1915 (5 & 6 *Geo.* 5, *c.* 60)—*Military Service Act*, 1916 (5 & 6 *Geo.* 5, *c.* 104)—*Military Service Act* (*Session* 2), 1916 (6 & 7 *Geo.* 5, *c.* 15)—*Military Service Regulations* (*Amendment*) *Order*, 1916.

The local military tribunal constituted under the Military Service Acts, 1916, and the Military Service Regulations (Amendment) Order, 1916, and the Regulations annexed thereto is a judicial body, and defamatory statements made by a member in the course of proceedings before it are absolutely privileged.

TRIAL of point of law in an action before Sankey J.

This was an action for damages for slander in which the defendant, amongst other defences, pleaded by paragraph 6 of his defence, "The words complained of were spoken and published (if at all, which is denied) on an occasion which was absolutely privileged, namely, while the defendant was sitting as and discharging the office duties and functions of a member of, and in the course of proceedings before the East Elloe local military tribunal, a statutory body duly constituted and exercising judicial functions under and by virtue of the Military Service Acts, 1916, and of the Military Service Regulations (Amendment) Order, 1916, and of the Regulations annexed to such Order and of any other powers thereunto it enabling, and having jurisdiction to deal with the matter then and there before it, to wit, the granting or refusing of certificates of exemption under the said Acts, Order and Regulations, to certain members of the plaintiff copartnership. . . . ."

The point of law so raised by the defendant's pleading was set down under Order XXV., r. 2, for hearing before the trial, and now came on to be disposed of.

C. E. Dyer for the defendant. The local tribunal is established under the Military Service Act, 1916, s. 1 of which imposed the obligation of general service with the colours or in the reserve, and

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by s. 2 of which the tribunal is appointed to consider the granting of certificates of exemption. The Second Schedule to the Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), by clause 1 provides that there shall be a local tribunal for each local registration district under the National Registration Act, 1915, and by clause 5 provides that His Majesty may by Order in Council make regulations as to the constitution, functions, and procedure thereof; and the Military Service Regulations (Amendment) Order, 1916, and the schedule thereto annexed by Part I., ss. 1 and 2, provide for the constitution of local tribunals and the procedure before them; see, too, Part II. (Appeal Tribunals) and Part III. (General). I submit that under these provisions the local tribunal so constituted is a judicial and not merely an administrative body, and that the case falls within the doctrine of absolute privilege. [He referred in detail to s. 2, clauses 1—25.] The procedure throughout is that characteristic of a judicial body. By clause 2 all applications are to be heard in public unless otherwise ordered; by clause 9 the military representative may appear as party; by clause 19 any person aggrieved by a decision of the local tribunal may appeal. By clause 5 questions before the local tribunal are decided by a majority present and voting, and by clause 6 the chairman has a second and casting vote, but neither of these provisions affects the judicial character of the tribunal. It is true that under clause 16 the party is not compelled to give evidence before the tribunal, but by the Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), s. 3, sub-s. 4, a false statement or representation is punishable by imprisonment. The questions to be decided by the tribunal alter the status of the individual, and the case falls within the principles laid down in *Dawkins* v. *Lord Rokeby* (1), *Munster* v. *Lamb* (2), *Royal Aquarium Society* v. *Parkinson* (3), *Hodson* v. *Pare* (4), *Barratt* v. *Kearns* (5), *Bottomley* v. *Brougham* (6), *Burr* v. *Smith* (7), and *Slack* v. *Barr.* (8) The statements, therefore, made by the defendant were absolutely privileged, and the point of law should be answered in favour of the defendant.

(1) (1873) L. R. 8 Q. B. 255; (1875) L. R. 7 H. L. 744.
(2) (1883) 11 Q. B. D. 588.
(3) [1892] 1 Q. B. 431.
(4) [1899] 1 Q. B. 455.
(5) [1905] 1 K. B. 504.
(6) [1908] 1 K. B. 584.
(7) [1909] 2 K. B. 306.
(8) (1918) 82 J. P. 91.

T. Hollis Walker K.C. and *F. Hinde* for the plaintiff. In considering whether the claim for absolute privilege can be maintained it is necessary to consider the constitution of the tribunal, its functions, and its procedure. In the first place it is important to observe that the local tribunal is an offshoot of a merely administrative body: National Registration Act, 1915, s. 2; and the members of the tribunal are in the hands of the local registration authority, which by s. 1 (Constitution of Local Tribunals), clause 1, may fill casual vacancies on the tribunal and revoke the appointment of any member. Secondly, the functions of the tribunal are purely administrative -the issuing of certificates of exemption under s. 2 of the Military Service Act, 1916. By virtue of that Act men become automatically members of the forces and come to this administrative body for certificates of exemption. There is nothing of a judicial nature in the granting such a certificate or licence. By s. 2, sub-s. 2, of the Act, "any Government department after consultation with the Army Council" can grant similar certificates, but it is not therefore a Court of justice. The tribunal has no power to administer an oath. Thirdly, the procedure under s. 2 of the regulations is that of an administrative and not of a judicial body. [They referred in detail to clauses 4, 5, 6, 16.] Clause 4, enabling applications to be heard in private, is unusual in a Court of justice. By clause 5 questions are decided by the majority of the members present and voting and no member may vote on any application in which he is interested, which is an unnecessary provision in a judicial body, as the proceedings would be quashed on certiorari. Clause 6, which gives the chairman a second or casting vote, is usual in an administrative body, but unusual in Courts of justice. By clause 16 (*a*) the local tribunal are not compelled to hear evidence, and by clause 16 (*d*) the representative of any Government department concerned authorized by the department may put relevant questions to any party or any witnesses admitted by the local tribunal to be heard, and may place any facts relevant to the application before the tribunal. The intervention of a Government department shows that the tribunal is not to have a judicial character; see, too, Part III. to the schedule, which by clause 2 gives an exceptional power for rehearing by the tribunal if any reason which the Local Government Board consider to be sufficient

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is shown for a rehearing. [They further referred to *Attwood* v. *Chapman*. (1)]

C. E. Dyer in reply.

SANKEY J. referred to paragraph 6 of the defence and the point of law set down for trial, and continued: That point of law now comes on for determination, and it falls to be decided whether a local tribunal set up under the Military Service Acts, 1916, and the regulations made in pursuance thereof is a tribunal of such a character that any statements made by a member thereof during the course of proceedings before it are absolutely privileged. A number of cases have been cited, but in my opinion there cannot be any controversy upon the principle of law which is applicable to the present case. That principle I conceive to be this, that where a tribunal is a Court of justice, or a body acting in a manner similar to that in which a Court of justice acts, any statement made by a member thereof is absolutely privileged and no action can be brought thereon. This absolute privilege extends also to advocates, litigants, and witnesses, and the reason which has induced our law to adopt that principle is, if I may be allowed to say so, best stated by Channell J. in *Bottomley* v. *Brougham* (2), "the reason being that it is desirable that persons who occupy certain positions as judges, as advocates, or as litigants should be perfectly free and independent, and, to secure their independence, that their acts and words should not be brought before tribunals for inquiry into them merely on the allegation that they are malicious." The law was originally laid down as far back as the year 1772 by Lord Mansfield in the case of *Rex* v. *Skinner* (3) and has been acted upon ever since. When, therefore, a question of this character is litigated it appears to me that the real point which falls for decision is whether the tribunal on the occasion is a tribunal which acts in a manner similar to that in which Courts of justice act. The rule has been applied to the case of a witness giving evidence in *Dawkins* v. *Lord Rokeby* (4), which was decided in 1873. It has been applied to the case of an advocate conducting a case before petty sessions in *Munster* v. *Lamb* (5); to the case of an application before a justice of the peace

(1) [1914] 3 K. B. 275.
(2) [1908] 1 K. B. 584, 587.
(3) (1772) Lofft, 55.
(4) L. R. 8 Q. B. 255.
(5) 11 Q. B. D. 588.

under the Lunacy Act, 1890, in *Hodson* v. *Pare* (1); to the case of a commission issued by the bishop of a diocese under the Pluralities Act, 1835, to inquire into the conduct of an incumbent, in *Barratt* v. *Kearns* (2); and has also been applied in the case to which I have already referred of *Bottomley* v. *Brougham* (3) to the report of an official receiver under the Companies (Winding up) Act, 1890. All these cases have been cited to me, but they are merely instances of the application of the general rule; on the other hand two cases have been cited to which the rule did not apply, one *Royal Aquarium Society* v. *Parkinson* (4), where it was held that a meeting of the London County Council to consider licences for music and dancing was not a meeting which I may describe shortly as a judicial tribunal within the meaning of the rule, and the other *Attwood* v. *Chapman* (5), where it was decided by Avory J. that a meeting of the licensing justices was not a tribunal of this character, and that consequently there was no absolute privilege in the case of a person who gave notice of his intention to oppose the application by the plaintiff for a licence. The question which I have to decide is, therefore, under which category does this local tribunal fall? Does it come within that which I may describe shortly as a judicial tribunal, or does it come within a merely administrative tribunal? For that purpose it is necessary to examine the constitution of the tribunal somewhat narrowly. The tribunal owed its origin at first to the National Registration Act of 1915, s. 2 of which provides: "The Registrar-General, acting under the directions of the Local Government Board, shall be the central registration authority, and the Common Council of the City of London, and the councils of metropolitan and municipal boroughs, and of urban and rural districts, and the Council of the Scilly Islands shall be the local registration authorities for their respective areas and each such area shall be a separate registration district"; the object being to obtain a register of persons between the ages of fifteen and sixty-five. That being the object of the registration, an Act was passed in the year 1916 which set up the tribunals in question. The Act is known as the Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), and by s. 2 a tribunal is

(1) [1899] 1 Q. B. 455.
(2) [1905] 1 K. B. 504.
(3) [1908] 1 K. B. 584, 587.
(4) [1892] 1 Q. B. 431.
(5) [1914] 3 K. B. 275.

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appointed to consider the granting of certificates of exemption to men from serving in the Army. Sect. 2 provides: "An application may be made at any time before the appointed date to the local tribunal established under this Act by or in respect of any man for the issue to him of a certificate of exemption from the provisions of this Act." And by the Second Schedule to that Act the constitution of the tribunal was provided for. The tribunal, by clause 1 of the Second Schedule, is to be of this character: "There shall be a local tribunal for each local registration district"—in this case the rural district council of East Elloe—"under the National Registration Act, 1915, in Great Britain, or for any division of any such district which may be adopted for the purpose by the registration authority of the district, consisting of such persons, not less than five and not exceeding 25 in number, as may be appointed for the purpose by that authority." The schedule also provides for an appeal from that tribunal, and it further provides by clause 5: "His Majesty may by Order in Council make regulations with respect to the constitution, functions and procedure of the local tribunals, the appeal tribunals and the central tribunal; and, so far as provision is not made for procedure by those regulations, the procedure of the tribunal shall be such as may be determined by the tribunal. Regulations made under this provision shall contain instructions to the local and appeal tribunals given with a view to securing uniformity of decision and practice amongst the several tribunals." That being the constitution of the tribunal, one has to turn to the regulations to consider (1.) the constitution, (2.) the functions, and (3.) the procedure of the tribunal, and learned counsel who appear for the plaintiff say that these considerations lead to the conclusion that the tribunal is not a tribunal of a judicial character within the meaning of the rule to which I have referred, but is a tribunal of an administrative character, and that therefore the statements made before it are not absolutely privileged. Now, dealing with the first of the plaintiff's points, that is to say, that the constitution of the tribunal shows that it is not of a judicial character: it is urged that the tribunal in question is the offshoot of a purely administrative body, namely, a rural district council, which points to the fact that a body created by a purely administrative body must be a body of an administrative character as distinguished

from a body of a judicial character. It is pointed out that the local authority may fill up casual vacancies and may remove or revoke the appointment of any member. In my opinion, however, that is not an argument which I can accept. I do not think it right to hold that merely because a tribunal is appointed by a non-judicial authority therefore the tribunal so appointed is non-judicial and must be administrative. There are many cases in this country in which judges are appointed by non-judicial persons. I should not have to travel far in order to cite examples. Moreover, in the recent case of *Slack* v. *Barr* (1) the question was directly raised whether the committee appointed by the First Lord of the Treasury known as the Committee on Production, one of the three arbitration tribunals appointed under the Munitions of War Act, 1915, was a body of such a character that statements before it were absolutely privileged, and Lord Anderson decided that it was.

I now turn to the second point made by the defendant, namely, the consideration of the functions of the tribunal in question. Counsel for the plaintiff says that those functions are to issue certificates for exemption, and that by s. 2, sub-s. 2, of the Act certificates of exemption may be granted by any Government department after consultation with the Army Council. I am of opinion that that argument is not maintainable. I think the functions of this tribunal are certainly functions which connote that the tribunal itself is possessed of judicial powers within the meaning of the rule. To begin with, the mere fact that the tribunal is not empowered to administer an oath is not a circumstance which the plaintiff can rely upon as showing that the functions of the tribunal are not judicial. Authority for that proposition will be found in *Barratt* v. *Kearns*. (2) That was the case of a commission appointed by the Bishop of the diocese of Winchester to inquire into the adequate performance of the ecclesiastical duties of a benefice, and Cozens-Hardy L.J., in giving judgment in the Court of Appeal, said : " One point only in the proceedings remains to be noticed. The evidence before the commissioners was not given upon oath, but the same remark is applicable to the evidence given which led to the action of *Dawkins* v. *Lord Rokeby*. (3) In this case I certainly

(1) 82 J. P. 91.
(2) [1905] 1 K. B. 504, 511.
(3) L. R. 8 Q. B. 255 ; L. R. 7 H. L. 744.

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think that the commissioners were in error in not taking the evidence upon oath; but that is not a mistake which vitiates the whole proceedings, or alters the character of the tribunal. I agree, therefore, that the appeal should be allowed so far as the answer to the second interrogatory is concerned." On the other hand, in my view this tribunal under the Military Service Acts, 1916, does interfere, and interfere to the greatest possible extent, with the status of a man, and, further than that, it is to be observed that, although the tribunal has no power to administer an oath, there is a penalty attaching to persons making false statements before the tribunal, for s. 3, sub-s. 4, of the Military Service Act, 1916, sets out the purposes of the tribunal and says: "If for the purpose of obtaining exemption for himself or any other person, or for the purpose of obtaining the renewal, variation, or withdrawal of a certificate of exemption, any person makes any false statement or false representation, he shall be liable on summary conviction to imprisonment for a term not exceeding six months with or without hard labour." In my opinion, therefore, the second point taken by the plaintiff's counsel so far as it is based on the functions of the tribunal fails.

I now deal with the third point, that is, the procedure of the tribunal, and for that I turn to the regulations. My attention was drawn to a number of regulations from which the learned counsel for the plaintiff sought to deduce that this tribunal was not one of a judicial character. He referred first of all to clause 4 of the regulations, which provides that "All applications to the local tribunal shall be heard in public, unless the tribunal, in any particular case, due regard being given to the interests of the parties and of any other person concerned in the application, consider that an application or any part of the proceedings thereon should be heard in private; provided that the tribunal may exclude the parties and the public at any time during the hearing of an application for the purpose of conferring upon any question affecting the decision of the application." In my view that is a power which is one of the attributes of a judicial tribunal, and the mere fact that it is granted to the tribunal in question does not, I think, show that it is not a judicial tribunal. To my mind it points the other way, the intention being that there may be no doubt but that the local tribunal shall have the attributes of a judicial tribunal. Clause 5 proceeds: "Questions

before the local tribunal shall be decided by a majority of the members of the tribunal present and voting, but a member shall not take part in the consideration of, or vote upon any question relating to, an application in the decision of which he is personally interested; and a member shall not vote on any question affecting the decision of an application, unless he has been present throughout the proceedings upon the question." There again I think the object is to preserve the character of a judicial tribunal. I think that I am right in saying that in cases where the tribunal is of an administrative character, however desirable and proper it may be that the persons with whom the decision rests should be present during the whole of the proceedings, it is not necessary as a matter of law. And the object of these regulations appears to me to be to assimilate this tribunal to a judicial tribunal, that is to say, to make it a tribunal acting in a manner similar to that in which Courts of justice act. I was a little troubled with clause 6, which provides: "In the event of an equality of votes, the chairman shall have a second or casting vote." But upon consideration I think that clause was necessary, and for this reason. Those of us who are familiar with the practice of the House of Lords will bear in mind the inconvenience which sometimes arises when their Lordships happen to be equally divided. Then I think one of two things happens, either the maxim "Omnia praesumuntur rite et solemniter acta donec probetur in contrarium" comes into force and the appeal is dismissed, usually without costs, or there is a rehearing with a larger number of their Lordships, and with if possible an uneven number. I think this clause was intended to avoid a similar unfortunate occurrence. It will be observed that the local tribunal may have as many as twenty-five members and must have at least as many as five members. It would be extremely inconvenient if a tribunal sitting with twelve members should be equally divided with a necessity for a rehearing of the case at a time of national emergency. The mere fact that the chairman can give a second or casting vote cannot, I think, make this tribunal non-judicial. Then I was directed to clause 16 (*a*), which provides: "For the purpose of ascertaining the facts relevant to the decision of an application, the local tribunal may hear such witnesses as they think fit, provided that they shall in all cases hear the parties to the application, and the man in respect of whom the

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application is made, or those of them who appear." It was then pointed out that a Government department may intervene, and it was said that the intervention of such parties shows that the tribunal is one of an administrative and not of a judicial character. I disagree, and when one considers the object of the tribunals I think it will be shown that my disagreement is justified. In the first place, the person most interested is the man; it is he who will eventually get his certificate of exception or have it refused. Equally interested is the employer, specially in the case where the employer has perhaps no other servants, and in which case he is equally interested with the man whose case is under discussion. Equally interested may be a Government department who may say that one of their officials is indispensable, and therefore I think provision has to be made for those persons who are interested having a right to appear and have their say in the matter. That does not, in my opinion, make the proceedings any less judicial. All it does is to clothe the tribunal with certain powers which possibly other Courts of justice have not.

It appears to me, therefore, that all the points made by the plaintiff fail; that the defendant's contention is right; and that, having regard to the reasons which I have given, the case falls within the principles of law which I ventured to indicate at the beginning of my judgment. I hold, therefore, that the occasion upon which the words were spoken was absolutely privileged, and I make a declaration to that effect.

Solicitors for defendant: *Henry Mossop & Sims, for Mossop & Mossop, Holbeach, Lincolnshire.*

Solicitor for plaintiff: *Chalton Hubbard.*

A. C.

[IN THE COURT OF CRIMINAL APPEAL.]

1918
June 10.

THE KING *v.* GEORGE SMITH.

Criminal Law—Receiving Stolen Goods—Guilty Knowledge—Evidence—Larceny Act, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 43, *sub-s.* 1.

By s. 43, sub-s. 1, of the Larceny Act, 1916, "Whenever any person is being proceeded against for receiving any property, knowing it to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings—(*a*) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession . . . ." :—

Held, that the evidence which may be given under the section by the prosecution as to the finding of stolen property in the prisoner's possession is not limited to the fact of its having been so found, but includes evidence as to the circumstances in which it was found and as to statements made at the time by the prisoner in explanation of the property being found in his possession, and, further, that the evidence as to its being stolen property need not be given before, but may be given after, the evidence as to its being found in the prisoner's possession, and, in the event of a failure by the prosecution to prove, with regard to a portion of it, that it was stolen property, such failure will not, if substantially all the property is proved to have been stolen, be a ground for quashing the conviction.

Appeal from a conviction at Birmingham Quarter Sessions.

The appellant, who was a metal dealer, was indicted for receiving stolen goods—namely, aluminium rods—knowing them to have been stolen. Under s. 43, sub-s. 1, of the Larceny Act, 1916 (1), in order to show guilty knowledge, evidence was given for the prosecution that the appellant, when questioned by a detective

(1) The Larceny Act, 1916, s. 43, sub-s. 1: "Whenever any person is being proceeded against for receiving any property, knowing it to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings—(*a*) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession. . . . ."

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before his arrest, had said that he had no metal on his premises, as he had given up buying it. The detective also gave evidence that he then went to the appellant's premises, and he detailed the circumstances in which he found there a large quantity of metal, which was the subject of other indictments, and which was produced in Court, and that the appellant, when asked how he accounted for the possession of certain brass ingots, said, "I don't know who I bought it from. If I did not buy it, some one else would"; and that later he said, "I was asked to sell the aluminium by a man who has a metal yard down the street." The prosecution afterwards gave evidence that the greater portion of the metal which was the subject of the other indictments had been stolen within the previous two or three months, but with regard to some portion of it the evidence failed to show that it was in fact stolen property. The appellant was convicted, and he appealed on the grounds (1.) that under s. 43 of the Larceny Act, 1916, the evidence as to the finding of other stolen property in the prisoner's possession must be limited to the fact of its having been so found, and that therefore the circumstances in which it was found and the statements of the prisoner with regard to it were inadmissible in evidence; and (2.) that until it had been proved that the property which was the subject of other indictments was in fact stolen property no evidence ought to have been admitted as to its having been found in the prisoner's possession.

Hugo Young K.C. (*Grierson* with him) for the appellant. The evidence which may be given under s. 43, sub-s. 1, of the Larceny Act, 1916, as to the finding of other stolen property, not the subject of the indictment, in the prisoner's possession is limited to the mere fact that it was so found. The sub-section does not authorize the prosecution to give evidence of statements by the prisoner with regard to it or of the circumstances in which it was found. No doubt the prisoner would be entitled to give evidence explaining his possession of such property, but the prosecution would have no right to give evidence to rebut that explanation. Secondly, the prosecution must, before producing such property in Court, and proving that it was found in the prisoner's possession, prove that it was stolen.

[ATKIN J. The circumstances in which property is found may in themselves prove that it was stolen: *Rex* v. *Sbarra*. (1)]

That case dealt with property which was the subject of the indictment. Different considerations apply under s. 43, sub-s. 1, of the Larceny Act, 1916. Here the prosecution in the first place produced in Court a whole array of goods in a manner most prejudicial to the prisoner and gave evidence that these goods, which were not the subject of this indictment, were found in the prisoner's possession, and when they afterwards endeavoured to prove that the goods were stolen they failed to prove this with regard to a portion of the goods. The fact that all the goods were not proved to have been stolen is a ground for quashing the conviction: *Rex* v. *Girod*. (2)

J. G. Hurst for the Crown was not called upon to argue.

The judgment of the COURT (Darling, Atkin, and Shearman JJ.) was delivered by

DARLING J. In this case evidence was properly given that other property stolen within the period of twelve months preceding the date of the offence charged was found in the appellant's possession, and evidence was also given as to the circumstances in which it was found and as to statements made by the appellant in explanation. Now it has been contended for the appellant that the evidence ought not to have travelled beyond the mere fact of other stolen property being found in his possession and that the prosecution were not entitled to give evidence as to the circumstances or as to the appellant's statements with regard to it, as it was not the subject of the indictment on which the appellant was being tried. That other stolen property was the subject of other indictments, and the evidence which is objected to would have been admissible on the trial of those indictments, but the contention for the appellant is that on this indictment that evidence was not admissible under s. 43, sub-s. 1, of the Larceny Act, 1916, for the purpose of proving guilty knowledge. The sub-section does not, however, contain any indication that the evidence admissible with regard to other stolen property for the purpose of proving guilty knowledge is to be different from the evidence which would be admissible on

(1) [1918] W. N. 90. (2) (1906) 70 J. P. 514, 516.

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the trial of an indictment for receiving that other stolen property itself. The case of *Rex* v. *Girod* (1) is really an authority against the appellant's contention, for in that case statements made by the prisoner with regard to other goods, not the subject of the indictment, were given in evidence for the purpose of showing guilty knowledge as to the goods which were the subject of the indictment, and Lord Alverstone C.J. in his judgment said : "The only other matter urged is that the woman said at first that she had bought it at Glaves' shop, then corrected herself and said she had bought it at Peter Robinson's. It is not at all unnatural that she should not at once remember where she got it." Those statements by the female prisoner referred to goods which were not the subject of the indictment, but it was never suggested that those statements as to the other goods, not the subject of the indictment, were not admissible, or that the prosecution were limited to evidence of the mere fact of the finding of other stolen property in the prisoner's possession. The judgments clearly proceeded on the assumption that the evidence of the prisoner's statements as to the other goods was admissible, and therefore so far as that case goes it is an authority against the appellant's contention. That case was referred to in *Rex* v. *Ballard* (2), where Lord Reading C.J. said : "If there is evidence that the property was stolen it has to be tendered before the defence has to give an answer. It is impossible for the Court to say what answer is going to be made. The point was discussed in *Rex* v. *Girod* (1) ; it is not necessary to examine that case with any care. The Court quashed the conviction because the evidence was admitted without any evidence that the property had been stolen." That shows that the case of *Rex* v. *Girod* (1) is not an authority against the prosecution in the present case, and we are of opinion that under s. 43, sub-s. 1, the same evidence can be given with regard to statements by the prisoner and to the circumstances in which other stolen goods were found in the prisoner's possession as could be given on the trial of an indictment for receiving those goods.

It has also been contended for the appellant that the other goods not the subject of this indictment, should not have been produced in Court and no evidence should have been given as to their being

(1) 70 J. P. 514, 516. (2) (1916) 12 Cr. App. R. 1, 5.

found in the prisoner's possession, until after it had been shown that they had been stolen, and it is pointed out that at all events with regard to one article the prosecution failed to prove that it had been stolen. It may be that the better course to adopt would be, before giving evidence that the goods were found in the prisoner's possession, to give evidence that they were stolen, but it would be difficult to give evidence that they were stolen without producing them in Court, and the natural inference from their production would be that they were in some way connected with the prisoner. In any case, this is not a matter on which we could quash the conviction. It is a matter for the discretion of the judge at the trial to say which is the more convenient course, and we cannot say that one course is right and the other wrong. If the prosecution, having given evidence that certain articles, not the subject of the indictment, were found in the prisoner's possession, should fail, with regard to some of them, to prove that they were stolen, the judge can point out to the jury this defect in the evidence, and the failure of the prosecution to prove that all the goods were stolen would tell in the prisoner's favour. The appeal will be dismissed.

Appeal dismissed.

Solicitor for appellant: *J. Hall-Wright, Birmingham.*
Solicitors for prosecution: *Philip Baker & Co., Birmingham.*

J. S. H.

1918
June 14.

GSCHWIND, APPELLANT *v.* HUNTINGTON, RESPONDENT.

Army—Military Service—Dual Nationality—"Voluntary and formal act" renouncing British Nationality—Declaration of Alienage—British Nationality and Status of Aliens Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 17), *ss.* 13, 14, *sub-s.* 1—*Military Service Act*, 1916 (5 *&* 6 *Geo.* 5, *c.* 104), *s.* 1, *sub-s.* 1.

By s. 14, sub-s. 1, of the British Nationality and Status of Aliens Act, 1914, "Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign State a subject also of that State, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject":—

Held, that a person who was a British subject and was also possessed of another nationality at the date when he came within the operation of the Military Service Acts, 1916, cannot by making a declaration of alienage under the above enactment after the date when he came within the operation of those Acts take himself out of their operation, whether such declaration has or has not been duly registered, and whether the other nationality thereby adopted by the declarant is the nationality of an enemy, an allied, or a neutral State.

Rex v. *Commanding Officer, ——th Battalion, Middlesex Regiment, Ex parte Freyberger* [1917] 2 K. B. 129 followed.

CASE stated by the stipendiary magistrate for Manchester.

On March 8, 1918, a complaint was preferred by the respondent against the appellant for failing on January 29, 1918, to report for service in the Army.

The appellant was born in Manchester on May 14, 1892, his parents being natural-born Swiss subjects, and by art. 270 of the Swiss Civil Code he acquired from his birth a right to the citizenship of his father. On June 11, 1908, whilst the appellant was in Switzerland, his birth was duly registered in that country, but this registration did not affect his status, as it only amounted to a claim to the citizenship of his father. In 1911 the appellant was called upon by the Swiss military authorities to present himself for medical examination, and he submitted himself to this examina-

tion and was passed for general service. In April, 1912, the appellant joined the Swiss Army, and he served for 67 days. In March, 1913, the appellant served 22 days with the Swiss Army and was promoted to the rank of corporal. On May 13, 1913, the appellant came of age. On August 18, 1914, the Swiss Republic warned all their subjects of military age in the United Kingdom to mobilize in London. The appellant was then in England, and he responded to this call, and on August 19, 1914, proceeded to Switzerland, and he served with the Swiss Army till December 24, 1914, when his battalion was demobilized. The appellant then obtained a year's leave of absence from the Swiss Army, and he returned to England on January 8, 1915. Since August 14, 1915, the appellant had been and at the time of the charge was ordinarily resident in Great Britain In August, 1915, the appellant, in filling up his form under the National Registration Act, 1915, described himself as a Swiss. When the Aliens Restriction (Amendment) Order, 1916, came into operation, the appellant on February 14, 1916, registered himself as an alien, and he had since complied with all the requirements of the Order. On April 4, 1917, the appellant made a declaration of alienage under s. 14, sub-s. 1, of the British Nationality and Status of Aliens Act, 1914 (1), and it was duly registered. The appellant was duly served with a notice calling him up for service in the British Army as from November 29, 1917, but he failed to report for service. On November 30, 1917, the Swiss military authorities telegraphed to the Swiss Consul in Manchester that the appellant must immediately return to Switzerland for relief service, but the appellant did not go, as the present proceedings

(1) The British Nationality and Status of Aliens Act, 1914, s. 13: "A British subject who, when in any foreign State and not under disability, by obtaining a certificate of naturalization, or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject."

Sect. 14, sub-s. 1: "Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign State a subject also of that State, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject."

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were pending. The appellant was an unmarried man, and he still retained the rank of corporal in the Swiss Army.

It was contended for the appellant that he was a Swiss subject, and was therefore outside the scope of the Military Service Act, 1916, as by his acts he had adopted Swiss nationality and had divested himself of the British nationality which he had possessed through being born in England.

The magistrate held that on March 2, 1916, when the Military Service Act, 1916, came into operation, the appellant was a British subject, and that therefore he was liable to military service, and he convicted the appellant.

Sir Erle Richards K.C. (*T. E. Forster* with him) for the appellant. The appellant is not liable to military service under the Military Service Acts, 1916. He was a person of dual nationality, and his service with the Swiss Army after he came of age constitutes a "voluntary and formal act" within s. 13 of the British Nationality and Status of Aliens Act, 1914. Even if that is not so, and if therefore he was a British subject on March 2, 1916, when the Military Service Act, 1916, came into operation, the declaration of alienage which he made in April, 1917, and which was accepted by the British authorities, took him out of the operation of the Military Service Acts. A man is not liable to military service unless at the time when he is called up he is a British subject. By art. V. of the Treaty of September 6, 1855, between Great Britain and the Swiss Confederation, "The subjects or citizens of either of the two Contracting Parties in the territories of the other, shall be exempted from all compulsory military service whatever, whether in the army, navy, or national guard or militia." The case of *Rex* v. *Commanding Officer, ——th Battalion, Middlesex Regiment, Ex parte Freyberger* (1) is distinguishable. There the appellant was desirous of electing in favour of an enemy nationality, and, further, his declaration had never been accepted by the Home Office. The case of *Vecht* v. *Taylor* (2) turned entirely on the fact that the appellant did not make the declaration of alienage until after he had been charged before the magistrate. In *Dawson* v. *Meuli* (3)

(1) [1917] 2 K. B. 129. (2) (1917) 116 L. T. 446.
(3) (1918) 118 L. T. 357.

the respondent did not make the declaration until after he had been called up for service.

The respondent was not represented.

AVORY J. The appellant possessed a dual nationality, and it is contended that he has divested himself of his British nationality and is therefore not liable to military service. It is, however, obvious that when the Military Service Acts were passed—and for this purpose it is immaterial which Act one takes—it must have been present to the mind of the Legislature that there were in this country persons with a dual nationality, *i.e.* persons with a British nationality and also with the nationality of either an enemy or an allied or a neutral State, but the Acts contain no exception in favour of such persons. Unless, therefore, a person who was a British subject can be held to have ceased to be a British subject, the mere fact that he has another nationality does not take him out of the operation of those Acts. The only question, therefore, is whether the appellant can successfully contend that he was not within the operation of either Act at the appointed date by reason of his having ceased to be a British subject. It is contended that the appellant had ceased to be a British subject before any proceedings were taken against him. The relevant date is not, however, the date of the proceedings, but the date when the Act in question applied to him. So far as age and residence are concerned the appellant was within the operation of both the Military Service Acts when they were passed, and on the appointed date he became a British soldier, and in my opinion nothing that he could do after that date, whether by a "voluntary and formal act" under s. 13 of the British Nationality and Status of Aliens Act, 1914, or by a declaration of alienage under s. 14, sub-s. 1, of the same statute, or under s. 4 of the Naturalization Act, 1870, could take him out of the operation of the Military Service Acts. It makes no difference whether the declaration of alienage has been accepted by the Home Office, as in the present case, or whether, as in *Freyberger's Case* (1), it has not been so accepted. Neither does it make any difference whether the nationality in favour of which the person is endeavouring to elect, is an enemy or a neutral nationality.

(1) [1917] 2 K. B. 129.

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AVORY J.

Although in *Freyberger's Case* (1) the appellant was seeking to elect in favour of an enemy nationality, it is clear that the decision would have been the same if he had been seeking to elect in favour of a neutral nationality, for Swinfen Eady L.J. there said: "Can the appellant validly make a declaration of alienage during the existence of a state of war between this country and Austria? . . . . A British subject, although having a double nationality, cannot during a state of war divest himself of his allegiance to the British Crown in order to become solely the subject of an enemy State. . . . . The appellant was on the appointed date a male British subject within the ages specified, and therefore is deemed to have been duly enlisted for the period of the war. . . . . I see no ground upon which the appellant is entitled to claim his discharge from the Army." In the same case Bankes L.J. said: "It seems to me to be plain from the language of s. 1, sub-s. 1, of the Military Service Act, 1916, that on the appointed date the applicant became subject to the Act, and acquired a certain statutory status—the status of a person duly enlisted for the period of the war. Having acquired that statutory status, he cannot, in my opinion, by any voluntary act on his part, whether it be a formal declaration of alienage under the Act of 1914, assuming for the moment that he could make it, or any less formal act, divest himself of that status."

It is said that those observations only apply to a man whose declaration of alienage has not been accepted by the Home Office, or who is seeking to elect in favour of an enemy nationality, but in *Vecht* v. *Taylor* (2) the appellant was seeking to claim to be a Dutch subject, and his declaration of alienage was sent to the Home Office with a certificate of nationality issued by the Consul-General of the Netherlands, and it was held that the fact that the appellant was seeking to elect in favour of a neutral nationality did not distinguish the case from *Freyberger's Case*. (1) It is true that in *Vecht* v. *Taylor* (2) the appellant had made his declaration of alienage after the initiation of the proceedings before the magistrate, but in my opinion it makes no difference whether the declaration of alienage is made before or after the initiation of the proceedings, provided that it is made after the date when the Military Service Acts apply to the person making it. The later decision of

(1) [1917] 2 K. B. 129, 138, 139, 140. (2) 116 L. T. 446.

Dawson v. *Meuli* (1) again is a case where the respondent made a declaration of alienage for the purpose of electing in favour of a neutral nationality, namely Swiss, and the judgment of the Court was to the same effect, namely, that when a man has once become a soldier under the Military Service Acts he cannot divest himself of liability to military service by any "voluntary and formal act" under s. 13 of the British Nationality and Status of Aliens Act, 1914, or by a declaration of alienage under s. 14, sub-s. 1, of the same statute. The appeal must therefore be dismissed.

SHEARMAN J. I agree. It has been contended for the appellant that after he came of age and before he became a British soldier he did some "voluntary and formal act" whereby he became naturalized in Switzerland under s. 13 of the British Nationality and Status of Aliens Act, 1914. It is difficult to define the meaning of the words "voluntary and formal act" in that section, but it is sufficient for the purpose of this case to say that it must mean an act renouncing and abandoning the status of a British subject. Sects. 13 and 14 of that Act and ss. 3 and 4 of the Naturalization Act, 1870, are a modification of the old principle "nemo potest exuere patriam" and prescribe certain methods by which a person of dual nationality can abandon one of his nationalities and by which a person having one nationality can abandon it in exchange for another nationality. I cannot see that between the date when the appellant came of age and the appointed date under either of the Military Service Acts the appellant did any act showing an election to abandon British nationality in favour of Swiss nationality. I agree with Avory J. as to the ineffectiveness of anything done by the appellant after that appointed date.

SANKEY J. I agree.

Appeal dismissed.

Solicitors: *Barlow, Barlow & Lyde, for James Chapman & Co., Manchester.*

(1) 118 L. T. 357.

J. S. H.

1918
June 18.

HULME *v.* FERRANTI, LIMITED.

County Court—Jurisdiction—Claim by Munitions Worker for Wages in Lieu of Notice—Munitions of War (Amendment) Act, 1916 (5 & 6 *Geo.* 5, *c.* 99), *s.* 5, *sub-s.* 3.

The plaintiff was a workman employed on piecework by the defendants in their controlled establishment upon the terms that if there was no work there was to be no pay. No notice to terminate the contract of service was required on either side. Owing to a strike of some workmen the defendants closed their works for a week. The plaintiff sued the defendants in the county court, alleging a breach by them of their implied undertaking to provide him with a reasonable amount of work during the week the works were closed, and contending that the Munitions of War Act, 1916, had imported a term that seven days' notice was necessary in order to terminate the contract of service :—

Held, that the county court had no jurisdiction to entertain the action, which was for breach of an obligation created by the Munitions of War Acts, inasmuch as a specified tribunal had been provided by those Acts to deal with breaches of obligations arising thereunder.

Appeal from Oldham County Court.

The plaintiff was an iron moulder in the employment of the defendants, who were electrical and general engineers, and whose works were a controlled establishment within the meaning of the Munitions of War Acts, 1915 and 1916. The terms of the plaintiff's employment were that he should be paid by piecework. On May 3, 1917, the engineers, but not the iron moulders, in the defendants' emp'oy went out on strike. The defendants thereupon determined to close their works, and put up a notice to that effect. The works remained closed from May 3 until May 10.

The plaintiff brought an action against the defendants in the county court for damages for breach by the defendants of their implied undertaking to provide him with a reasonable amount of work as a pieceworker from May 3 to May 10, or, alternatively, a week's wages between those dates. The plaintiff's earnings as a pieceworker averaged 54*s.* per week.

It was admitted that when the contract of service was entered into between the plaintiff and the defendants the terms were that if there was no work there should be no pay and that no notice to terminate the contract of service was required on either side.

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The county court judge held that the Munitions of War Act, 1916, required that seven days' notice should be given on either side in order to terminate the contract, and that there was therefore an implied undertaking by the defendants to provide the plaintiff with a reasonable amount of work between May 3 and 10, 1917, and he accordingly gave judgment for the plaintiff for 2*l.* 14*s.*

The defendants appealed.

Rigby Swift K.C. and *Eastham* for the defendants. The county court judge was wrong in holding that the effect of the Munitions of War Act, 1916, was to import a term into the contract of service that a week's notice was required before it could be terminated. That statute merely provides that where a workman employed on munitions work is dismissed without notice the tribunal may award him compensation not exceeding 5*l.*; it does not say, nor does it imply, that seven days' notice must be given before the contract of service can be terminated. The Munitions of War Act, 1917 (7 & 8 Geo. 5, c. 45), expressly provides in s. 3 that a contract of service of a workman employed on munitions work shall not be determinable except by a week's notice. But that Act was not in force when this cause of action arose. All that the earlier Acts said was that the workman should have a statutory right to apply for a leaving certificate and for compensation.

Further, the county court judge had no jurisdiction to entertain this action. The action was for breach of an obligation which, if it existed, was created by the Munitions of War Acts. Special tribunals are designated by those Acts, and they alone can enforce those obligations. Lord Tenterden in *Doe* v. *Bridges* 1) said: "Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." That statement of the law was approved by the House of Lords in *Pasmore* v. *Oswaldtwistle Urban Council.* (2)

Cyril Atkinson K.C. and *Claughton Scott* for the plaintiff. The county court judge was right in holding that the plaintiff was entitled to recover, as the defendants were bound to provide him with work. The terms upon which he was employed, according to his evidence,

(1) (1831) 1 B. & Ad. 847, 859. (2) [1898] A. C. 387.

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were that if the works stopped for want of material or from accident there should be no pay. The evidence that no notice was required referred to the length of notice required, but some notice must be given in order to terminate the employment. *Devonald* v. *Rosser & Sons* (1) decided that a custom of no work, no pay, was unreasonable and bad. It was also there held that there was an implied undertaking by the employers to provide a workman who was paid by piecework with a reasonable amount of work so long as the employment lasted.

[SHEARMAN J. In that case it was a term of the workman's employment that he was to receive twenty-eight days' notice in writing.]

In the present case the plaintiff is given a statutory right to a week's notice by s. 5, sub-s. 3, of the Munitions of War Act, 1916. That section would be quite illusory if an employer were not bound to provide work, that is, a reasonable amount of work, if work is to be had: see the dictum of Crompton J. in *Whittle* v. *Frankland*. (2) The plaintiff could not leave the defendants' employment and obtain work elsewhere for a period of six weeks by reason of s. 5, sub-s. 1, of the Act of 1916; he tried to obtain compensation from a munitions tribunal under s. 5, sub-s. 3, of the Act of 1916, but it was held that he was not entitled to compensation under that section because he had not been dismissed, and if the contention of the defendants that the county court had no jurisdiction to entertain this action is correct the result will be that the plaintiff is deprived of all remedy. There is no difference between a statutory obligation and a contractual obligation to give a week's notice; a workman is entitled to recover damages for breach of that obligation in the county court.

SHEARMAN J. The plaintiff in this case was a moulder employed by the defendants in some munitions works upon the terms, according to his own evidence, that he was not entitled to any notice. Some engineers at the defendants' works having come out on strike, the defendants determined to close their works, and they accordingly put up a notice that the works would be closed. Whether that notice amounted to the dismissal of the plaintiff entitling him to a week's notice we have not to determine in this case. The notice

(1) [1906] 2 K. B. 728. (2) (1862) 31 L. J. (M.C.) 81, 84.

was that the men's services would no longer be required. The plaintiff considered that, notwithstanding he was engaged upon the terms that he was not entitled to any notice, he was nevertheless entitled under the Munitions of War Acts to a week's notice, and he accordingly brought an action against the defendants in the county court for breach of their implied undertaking to find him work during the week the works were closed. The county court judge accepted the plaintiff's argument that the Munitions of War Act, 1916, imposed an obligation on an employer to give a week's notice to workmen employed on munitions work. The only words in the Act from which such an obligation can be implied are to be found in s. 5, sub-s. 3. The note in the margin of that section is "Amendment of section seven of principal Act." The note in the margin of s. 7 of the Act of 1915 is "Prohibition of the employment of persons who have left work in munition factories." Sect. 5, sub-s. 3, of the Act of 1916 provides that "where a contract of service with a workman employed on or in connection with munitions work . . . . is terminated by dismissal, and less than one week's notice, or wages in lieu of notice, has or have been given, the employer shall . . . . report the matter in such manner as may be prescribed by rules made by the Minister of Munitions, and such rules shall provide for the determination by a munitions tribunal (in case of difference)"—there is therefore a tribunal specified in the Act to decide the question —"of the amount, if any, and not in any case exceeding five pounds, which is to be paid by the employer to the workman in lieu of notice, and for the payment of the sum so determined to the workman, unless the tribunal is of opinion that owing to the discontinuance or temporary nature of the employment or misconduct of the workman the employer had reasonable cause for dismissing the workman without a week's notice." That section gives a wide discretion to a specified tribunal as to the length of notice which should be given to a workman employed on munitions work, and as to the compensation which should be given in default of such a notice. It is impossible to infer from those words that a term has been imported into every contract between a munitions worker and his employer that he is entitled to seven days' notice. The later Act of 1917 expressly provides that a contract of service of a workman employed on or in connection with munitions work shall not be determined without a

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week's notice, but such a term cannot be implied from the language of the earlier Act. The county court judge has held that the Act of 1916 did import such a term into the plaintiff's contract of service, and gave the plaintiff judgment for 2*l.* 14*s.* for breach of the term. He prefaced his judgment by a statement, which he was quite entitled to do by reason of the admissions that had been made, that apart from the Munitions of War Act, 1916, the plaintiff would probably have no cause of action.

The defendants appeal from that decision, and it has been argued on their behalf, first, that the Act does not import such a term into the contract of employment, and, secondly, that if it does, the Act itself makes the munitions tribunal the only tribunal to decide whether or not there has been any breach of the term. It seems to me that that proposition cannot be controverted. It is quite clear from *Pasmore* v. *Oswaldtwistle Urban Council* (1) that the old principle remains. Lord Halsbury L.C. there said: "The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe* v. *Bridges*. (2) He says: 'where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.'" It is therefore clear that the defendants are right when they say that no claim arising under the Munitions of War Acts can be brought before any tribunal other than the tribunal specified by those Acts. We are of opinion that the county court judge came to a wrong conclusion upon the point of law. He ought to have held that the plaintiff had no remedy, and that even if he had a remedy, he had sought it in the wrong Court. The appeal must therefore be allowed.

SANKEY J. I agree. The plaintiff is a pieceworker, and it must be taken upon the evidence before us that he was not entitled to any notice in order to terminate his contract of service. He therefore did not come within the class of cases of which *Devonald* v.

(1) [1898] A. C. 387, 394. (2) 1 B. & Ad. 847, 859.

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Sankey J.

Rosser & Sons (1) is an example. In that case the plaintiff, who was a pieceworker, was entitled by his contract to a month's notice, and the Court for that reason held that the employer was bound to provide him with work during that period. The plaintiff in the present case was not entitled to any notice by his contract. It was, however, contended on his behalf that under s. 5, sub-s. 3, of the Munitions of War Act, 1916, he was entitled to a week's notice and therefore was in the same position as the plaintiff in *Devonald* v. *Rosser & Sons*. (1) I think it is clear upon a perusal of the section that it does not in any sense provide for a week's notice. It says that where a contract of service with a workman employed on munitions work is terminated by dismissal and less than one week's notice or wages in lieu of notice has or have been given the tribunal may determine the amount, not exceeding the sum of 5*l*., to be paid to him by the employer in lieu of notice. It is manifest that that section does not give a workman any right to a week's notice. This is made still more clear by the fact that the Munitions of War Act, 1917, expressly gives a workman employed on munitions work the right to a week's notice. In my opinion the plaintiff is unable to extract from the Act upon which he relies any provision to the effect that he is entitled to a week's notice, and, further, any claim for such a right must be brought before the tribunal set up by that Act to deal with cases arising thereunder.

Appeal allowed.

Solicitors for plaintiff: *Church, Adams, Prior & Balmer, for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for defendants: *Peter Thomas & Clark, for Skelton & Co., Manchester.*

(1) [1906] 2 K. B. 728.

R. F. S.

1918
June 24;
July 2.

SINGER *v.* WILLIAMS (Surveyor of Taxes).

Revenue—Income Tax—"Income arising from securities, stocks, shares . . . . in any place out of the United Kingdom"—Income arising from Shares in Foreign Company—Computation—Average of the three preceding Years—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Fourth and Fifth Cases—Finance Act*, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 5.

The appellant, who resided in the United Kingdom, was assessed to income tax for the year ending April 6, 1916, in respect of the income which he received as a shareholder in an American corporation, the computation being made on the basis of the average amount of profits during the three preceding years. The appellant contended that by virtue of s. 5 of the Finance Act, 1914, the income tax ought to be computed solely on the basis of the actual amount of his profits in the year of assessment, and that in any event no income arising from the shares which was paid or became due before April 6, 1914, could be brought into computation :—

Held, that shares in a foreign corporation were not securities within s. 5, and that the dividends arising therefrom were assessable under the fifth case of Sched. D, s. 100, of the Income Tax Act, 1842, namely, upon the average amount of profits during the three preceding years.

Sect. 5 of the Finance Act, 1914, has not altered the method of computation provided in the Income Tax Act, 1842, except that income is made liable to assessment whether received in the United Kingdom or not.

Sub-paragraph (*b*) of that section does not prevent income from securities, stocks, shares, or rent in any place out of the United Kingdom which was paid or which became due before April 6, 1914, from being used in making the computation of income tax; it merely prevents income paid or due before that date and retained abroad from being liable to income tax if it is subsequently received in the United Kingdom.

Case stated by the Commissioners for the General Purposes of the Income Tax Acts for the division of Romsey in the county of Southampton.

At a meeting of the Commissioners held on October 6, 1916, the appellant, W. M. G. Singer, appealed against an assessment on him under Sched. D of the Income Tax Acts for the year ending April 5, 1916, in the sum of 80,000*l.* in respect of foreign possessions on the following amongst other grounds: That

in view of s. 5 of the Finance Act, 1914 (1), such computation should be based on the amount of the profits in the year of assessment and not on the average amount thereof in the three preceding years.

The facts proved or admitted were that the appellant resided, and for several years past had resided, at Norman Court in the division of Romsey, and his income, so far as it was the subject-matter of the assessment in question, was derived from the dividends which he received as a shareholder in an American corporation, i.e., the Singer Manufacturing Company of New Jersey in the United States of America.

It was contended on behalf of the appellant that in view of the terms of s. 5 of the Finance Act, 1914, his profits for the purposes of the assessment under appeal must be computed on the basis of the actual amount thereof in the year of assessment ending April 5, 1916, and not on the average of the amount thereof in the three previous years of average; and, further, that if it should be held that the income chargeable must be based on the average of preceding years, then, by virtue of the provisions of the Income Tax Acts and of sub-clause (*b*) of s. 5 of the Finance Act, 1914, no sums which were paid or became due before April 6, 1914, could be brought into computation.

In answer thereto it was contended on behalf of the surveyor of taxes that the provisions of s. 5 of the Finance Act, 1914, in no way altered or repealed the rule laid down in the fifth case of Sched. D,

(1) Finance Act, 1914, s. 5: "Income tax in respect of income arising from securities, stocks, shares, or rents in any place out of the United Kingdom shall, notwithstanding anything in the rules under the fourth and fifth case in s. 100 of the Income Tax Act, 1842, be computed on the full amount of the income, whether the income has been or will be received in the United Kingdom or not . . . .; and the provisions of the Income Tax Acts . . . . shall apply accordingly, and nothing in those provisions as to the receipt of sums in the United Kingdom shall be construed so as to render liable under those rules to income tax for the current or any subsequent year any sums which represent—

"(*a*) income from any such securities, stocks, shares, or rents, on which income tax has been paid under this section; or

"(*b*) income from any such securities, stocks, shares or rents which was paid or became due before the sixth day of April, 1914:"

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s. 100 of the Income Tax Act, 1842, that the duty is to be computed on an average of the three preceding years.

The Commissioners decided that on the true construction of s. 5 of the Finance Act, 1914, the computation must be made on the average of the three preceding years.

It was agreed between the parties that if the computation were made on the basis of the actual amount of profits in the year of assessment the figure of assessment should be 47,080*l.*, and that if the computation were made on an average of the three preceding years the figure of assessment should be 76,687*l.* If the further contention by the appellant that if the income was chargeable on the basis of preceding years no sums which were paid or became due before April 6, 1914, could be brought into the computation was correct, then an adjustment would have to be made.

The Commissioners accordingly reduced the assessment to the sum of 76,687*l.* and confirmed it in that amount, but at the request of the appellant stated this case for the opinion of the High Court.

Edwardes Jones for the appellant. Under s. 5 of the Finance Act, 1914, the appellant is only liable to be assessed on the actual income arising from the shares in the current year of assessment, and not on the average of the three preceding years. A distinction was drawn in Sched. D of s. 100 of the Income Tax Act, 1842, between income arising from foreign securities and income arising from foreign possessions; the income from foreign securities being computed under the fourth case on the full amount of the sums which have been or will be received in Great Britain in the current year, while the income from foreign possessions is computed under the fifth case on the sums annually received in Great Britain taking the average of the three preceding years. The term "securities" in s. 5 of the Act of 1914 includes the shares in a foreign company, and therefore the appellant, in accordance with the fourth case in Sched. D, ought to be taxed only on the income arising in the current year. The dictum of Wright J. in *Bartholomay Brewing Co.* v. *Wyatt* (1) that "shares in a company are not securities but portions of its capital" and are "not within the fourth case" was not necessary for the decision of that case and was therefore obiter. Fletcher

(1) [1893] 2 Q. B. 499, 516.

Moulton L.J. in *Gramophone and Typewriter, Ld.* v. *Stanley* (1) expressed it more accurately when he said that " the holding of shares in a foreign corporation, entirely situated and carrying on business in a foreign country, comes unquestionably under rule 5."

[*Sir Frederick Smith A.-G.* In the report of that case in the *Law Journal* (2) and in the *Tax Cases* (3) that sentence reads " comes unquestionably under case 5."]

The Court of Appeal in *In re Rayner* (4) held that " securities " meant " investments " and included stocks and shares in railway and other companies. Vaughan Williams L.J. there said that the word was not a term of art, but only a word of description. It was a commercial word which varied with the history of commerce. In the dictionaries the term is not limited to securities in the character of debentures. The word " securities " is defined in s. 2 (xiv.) of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41); in s. 2, sub-s. 10 (viii.), of the Settled Land Act, 1882 (45 & 46 Vict. c. 38); and in s. 50 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), as including " stocks, funds, and shares." The House of Lords in *Gresham Life Assurance Society* v. *Bishop* (5) dealt with income arising from foreign securities, including dividends on foreign investments and rents, as coming under the fourth case. A mistake arose in practice out of the dictum of Wright J. in *Bartholomay Brewing Co.* v. *Wyatt* (6), and s. 5 of the Finance Act, 1914, was intended to correct that mistake. The section joined together in one class " securities," " stocks," shares," and " rents," of which " securities " clearly come within the fourth case, and provided that the income tax in respect of income arising therefrom should be computed on " the full amount of the income," which means the full amount of the Income arising during the current year, and excludes an assessment on a three years' average. The clause that " the provisions of the Income Tax Acts . . . . shall apply accordingly " does not support the case for the Crown, because the words of the section are inconsistent with a computation of income tax on a three years' average. It is clear from the provision that income tax is to be computed on the full amount of the income " notwithstanding

(1) [1908] 2 K. B. 89, 97.
(2) 77 L. J. (K.B.) 834, 840.
(3) 5 Tax Cas. 358, 375.
(4) [1904] 1 Ch. 176.
(5) [1902] A. C. 287.
(6) [1893] 2 Q. B. 499, 516.

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anything in the rules under the fourth and fifth case in s. 100 of the Income Tax Act, 1842," that it was intended to restore the distinction between income arising from foreign possessions depending on personal exertions, which was assessed on an average of the three preceding years, and income arising from foreign securities not depending on personal exertions, which was assessed on the amount received during the year of assessment.

Even if the rule in the fifth case should apply so that the income chargeable must be computed on the average of the preceding years, nevertheless, by virtue of the provision of clause (*b*) of s. 5 of the Act of 1914, no income from such shares which was paid or became due before April 6, 1914, can be brought into the computation. A retrospective effect cannot be given to a statute, especially a taxing statute, unless the statute is expressly or by necessary implication made retrospective: *Moon* v. *Durden* (1); *Wright* v. *Hale.* (2) There is nothing in s. 5 of the Finance Act, 1914, to show that it was the intention of the Legislature that it should have a retrospective effect. If an average of the income during the three preceding years is taken in the present case the effect will be to give the section a retrospective effect.

Sir Frederick Smith A.-G. and *T. H. Parr* for the Crown. The Legislature in enacting s. 5 of the Finance Act, 1914, must be taken to have been aware of the view that had been adopted that shares in a company are not securities, and therefore not within the fourth case; it cannot have intended by classing "securities," "stocks," "shares," and "rents" together to enact that shares in a foreign company were securities and therefore within the fourth case. The decision of the House of Lords in *Gresham Life Assurance Society* v. *Bishop* (3) depended on what amounted to constructive receipt of income and not on what amounted to a security.

The intention of the Legislature in passing s. 5 was to enact that income arising from securities, stocks, shares, or rent in any place out of the United Kingdom, which had not been received in the United Kingdom, and which therefore under the fourth and fifth cases was not liable to income tax, was to be liable to income tax in the same way as income which had been received in the United

(1) (1848) 2 Ex. 22. (2) (1860) 6 H. & N. 227.
(3) [1902] A. C. 287.

Kingdom, notwithstanding anything in the rules under the fourth and fifth cases, but it was not intended to change the basis of the assessment, which depended upon whether the income fell within the fourth case or the fifth case. If it had been intended by the Legislature to do away with the three years' average it would have expressly so provided. The provision in sub-clause (*b*) to s. 5 was intended to prevent income from securities, stocks, shares, or rents on which income tax had been already paid under the section from being again liable to income tax when the income is actually received in the United Kingdom, and not to prevent a three years' average being taken.

Edwardes Jones replied.

Cur. adv. vult.

July 2. SANKEY J. read the following judgment :—The appellant resides near Southampton and receives income, so far as it is the subject-matter of the assessment in question, from dividends as a shareholder in the American corporation entitled the Singer Manufacturing Company of New Jersey in the United States of America.

Before the Finance Act of 1914 a charge in respect of income from foreign securities was made under the fourth case of Sched. D, and of foreign possessions under the fifth case of Sched. D in s. 100 of the Income Tax Act, 1842, and this charge was based on the sums received in the United Kingdom as therein set out. Under s. 5 of the Finance Act, 1914, the tax " in respect of income arising from securities, stocks, shares, or rents in any place out of the United Kingdom " is to be computed on " the full amount of the income, whether the income has been or will be received in the United Kingdom or not."

The Commissioners have assessed the appellant for the accounting period ending April 5, 1916, upon the average of the amounts received as dividends on his shares over the previous three years, and he contends : (1.) That by reason of the words in the earlier part of s. 5 of the Finance Act of 1914 he can only be assessed on the actual amount received during the one year. (2.) That by reason of the words in the later part of the section, " nothing in those provisions as to the receipt of sums in the United Kingdom shall be construed so as to render liable under those rules to income tax for the current

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or any subsequent year any sums which represent . . . . (*b*) income from any such . . . . shares . . . . which was paid or became due before the 6th day of April, 1914," a similar result is reached.

As to (1.): The fourth case above referred to enacts that the duty to be charged is to be computed on a sum not less than the full amount of the sums received in the current year. The fifth case enacts that the duty is to be computed on an average of the full amount of the actual sums received during the three preceding years. It was first contended by the appellant that shares were securities and came within the fourth case, and that therefore the actual amount received during the current year must be taken, and not the average amount. Having regard to the decisions of Wright J. in *Bartholomay Brewing Co.* v. *Wyatt* (1) and of Fletcher Moulton L.J. in *Gramophone and Typewriter, Ld.* v. *Stanley* (2), I am of opinion that it is not open to me to uphold this contention, and that dividends from shares are assessable under the fifth case, that is on an average of three years. It was then contended that s. 5 expressly or impliedly overruled those decisions. As to the section expressly overruling them, there is nothing therein to that effect. It nowhere says so. As to its impliedly overruling them, it was argued that because it says that income tax is to be "computed on the full amount of the income" this meant the full amount of the income received in the particular year, and not the averaged amount. In my view this contention is incorrect. Sect. 5 was a new departure in legislation in that it made taxable dividends on shares not remitted to this country, but the income is to be computed as provided in the Income Tax Act, 1842, as interpreted by the decisions thereunder, that is to say, on an averaged amount.

As to (2.): It was contended on behalf of the appellant that no sums which were paid or became due before April 6, 1914, could be brought into computation; that the section was not retrospective, and that those sums would be brought into computation if the average of three years were taken. In my view this is a misapprehension. The real position is, what is the meaning of the words "and nothing in those provisions as to the receipt of sums in the United Kingdom shall be construed so as to render liable under those rules to income tax for the current or any subsequent year

(1) [1893] 2 Q. B. 499, 516. (2) [1908] 2 K. B. 89, 97.

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any sums which represent . . . . (*b*) income from . . . . shares . . . which was paid or became due before the 6th day of April, 1914" ? I think that these words refer to sums actually received, and that the true effect of them is to prevent income paid or due before that date and retained abroad from being liable to income tax under the fourth or fifth cases of Sched. D if subsequently remitted to or received in the United Kingdom. In other words, they are inserted to prevent a double taxation of such sums and have no application to the user of such sums for the purpose of an arithmetical computation of the average income. In the result both grounds taken by the appellant fail, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Church, Rendall, Bird & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

R. F. S.

[IN THE COURT OF APPEAL.]

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NORTH LONDON AND GENERAL PROPERTY COMPANY, LIMITED *v.* MOY, LIMITED.

[1917 N. 381.]

Landlord and Tenant—Payment of Rent—Deduction of Property Tax by Tenant—Payment by Tenant to Collector of Tax—Production of Collector's Receipt to Landlord—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

A landlord is bound to allow, by way of deduction from or discharge of rent due from the tenant, a payment of property tax made by the tenant to the Inland Revenue authorities, notwithstanding that the tenant refuses to show him the collector's receipt for payment of the tax.

Judgment of Low J. [1917] 2 K. B. 617 reversed.

APPEAL of the defendants from a decision of Low J. in an action in the short cause list; reported [1917] 2 K. B. 617.

The action was brought to recover from the defendants 48*l.* 15*s.*, being as to 40*l.* for one quarter's rent due March 25, 1917, under a

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covenant by the defendants in a lease of premises, 116, Bayham Street, Camden Town, for eighteen years (less seven days) from September 29, 1904, whereby the defendants covenanted with the plaintiffs to pay them rent for the premises during the term at the rate of 160*l.* a year, by equal quarterly payments on the usual quarter days; and as to 8*l.* 15*s.* for one quarter's rent due March 25, 1917, under a covenant in a lease of premises, 118, Bayham Street, Camden Town, for twelve and a half years (less seven days) from March 25, 1910, whereby the defendants covenanted with the plaintiffs to pay them rent for the premises during the term at the rate of 35*l.* a year by equal quarterly payments on the usual quarter days.

By their notice of defence the defendants alleged that they paid the 48*l.* 15*s.* on or about February 9, 1917, to the collector of income tax, house duty, and land tax in respect of an assessment for the year ending, for income tax and house duty, on April 5, 1917, and for land tax on March 24, 1917, in respect of the respective premises; the payments being made under the Income Tax Act, 1853, s. 40, and the Revenue (No. 1) Act, 1864, s. 15, and other statutes thereunto enabling them. They further alleged that they had always been ready and willing to give inspection to the plaintiffs of the two receipts for the respective sums of 40*l.* and 8*l.* 15*s.*, given by the collector and dated February 10, 1917, and that they duly notified the plaintiffs of their willingness to give such inspection on repeated occasions by (inter alia) a letter dated May 9, 1917, and addressed to the plaintiffs' solicitors by the defendants from their registered office.

On May 7, 1917, in reply to a letter from the plaintiffs' solicitors asking for a cheque for the 48*l.* 15*s.*, the defendants wrote a letter saying that the quarter's rent of 116 and 118, Bayham Street, to March 25 last, 48*l.* 15*s.*, was balanced by the landlord's property tax (being 5*s.* in the pound) "of the same amount paid by us on February 9." On May 8 the plaintiffs' solicitors wrote in reply: "We have repeatedly asked you to produce to us the receipts for property tax paid, and we therefore cannot send you a receipt for the rent until you do so, nor can we allow the deduction. Please therefore send us the property tax receipts for the last three years for our inspection." On May 9, 1917, the defendants sent to the

plaintiffs' solicitors a letter which (so far as material) was as follows: "We shall be pleased to show your representative the receipt for the landlord's property tax paid on February 9 last . . . . if you will favour us with a call." Neither the plaintiffs nor their solicitors called at the defendants' office to inspect the receipts, their contention being that the defendants were bound in law either to pay the rent or to send the receipts for the equivalent of the rent to them for inspection, and that until the defendants had done so there had, in law, been no payment of the rent by them.

At the trial it was not disputed that the defendants had in fact paid 48*l.* 15*s.* by way of property tax on or about February 9, 1917.

Low J. held that the plaintiffs were entitled, before being called upon to allow, by way of deduction or discharge of rent due from the defendants, the payment of landlord's property tax made by the defendants to the Inland Revenue authorities, to see the collector's receipt for the payment of the tax, and that the plaintiffs were not bound to go to the tenant for the purpose of inspecting the receipt, it being the duty of the tenant to take it to his landlord.

The defendants appealed.

Lewis Thomas K.C. and *W. R. Warren* for the defendants.

Whately for the plaintiffs.

The arguments were the same as in the Court below and need no repetition. The following additional authority was cited: *In re Cooper.* (1)

PICKFORD L.J. I regret that I am unable to agree with the judgment of Low J. Counsel for the appellants said that there were no merits on either side; I do not feel sure of that, though I agree that there were none on the side of his clients, whose conduct has been throughout most unreasonable. If they had been asked to bring their receipts personally for the inspection of the plaintiffs, I can understand their objection, but it was unreasonable to refuse to send them by post and to tell the plaintiffs that they must come and look at them at the defendants' office. The plaintiffs are a land company, owning a great many houses, and if every tenant adopted the course which the defendants adopted they would be in a

(1) [1911] 2 K. B. 550.

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Pickford L.J.

position of considerable difficulty. It may be that it would have been wiser for the plaintiffs to yield to the unreasonable demand of the defendants. But we must deal with the case as a question of law.

The question for our decision is whether in a case where a tenant pleads on a defence to a claim for rent the fact that he has paid the landlord's property tax it is essential to the proof of that defence that he should produce to the landlord the receipt for such payment, or whether it is enough, if an action is brought against him for the rent, to prove the payment of the property tax in any way open to him. The contention before Low J. was that, under the provisions of the Income Tax Acts as to the allowance by the landlord of property tax paid by the tenant, the defence must be that the landlord had allowed it under the statutes and that before allowing it he was entitled to proper evidence of the payment, which would be the receipt of the officer of Inland Revenue, and that therefore the tenant could not escape payment of the rent unless he produced the receipt for the property tax. This contention was accepted before Low J., but I am unable to find any justification for it in the statutes. The first of the statutes was the Act of 1806, 46 Geo. 3, c. 65, now repealed, which by s. 74, Sched. A, No. IV., rule ninth, provided that tenants paying the duty in question should deduct it from the rent and that "all landlords . . . . shall allow such deductions and payments upon receipt of the residue of the rents, under the penalty herein contained . . . ." Then came the Income Tax Act, 1842, s. 103 of which provided that "if any person shall refuse to allow any deduction authorized to be made by this Act out of any rent or other annual payment mentioned in the ninth and tenth rules of No. IV., Schedule (A.) . . . . every such person shall forfeit the sum of fifty pounds." That was followed by the Income Tax Act, 1853, s. 40 of which provides that "Every person who shall be liable to the payment of any rent . . . . or other annual payment . . . . whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorized, on making such payment to deduct and detain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable under this Act . . . .; and the person liable to such pay-

ment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction, upon the receipt of the residue of such money, under pain of forfeiting the sum of fifty pounds for any refusal so to do."

In the present case the tenants would not produce to the landlords the receipt for the property tax, and the landlords brought an action for the quarter's rent; then on a summons under Order XIV. the tenants produced the receipt before the Master and contended that no rent was due. In *Cumming* v. *Bedborough* (1), which arose under the former Act of 1806, there is a dictum of Parke B. that payment of the property tax is to be taken as a payment in satisfaction of the rent; he said: "He" (the tenant) "is not in the situation of having paid money to the use of the landlord, but in that of a tenant who has paid rent in advance." In the same case Platt B. said (2): "This tax is assessed upon the occupier; he is bound to pay it; and the tenant's remedy is to recompense himself out of the next rent. The money paid by him for the tax is paid in part satisfaction of the rent; and how can money paid in part satisfaction of the rent, be paid to the use of the landlord?" Two other cases are of some importance. In *Tinckler* v. *Prentice* (3), which also arose under the Act of 1806, it was held to be a good plea to an action of debt for rent to plead that the tenant had paid the property tax; that is a decision on the point we are dealing with. The same was the decision in *Franklin* v. *Carter* (4), which was decided under the Income Tax Act, 1842, one of the Acts at present in force.

The result of the authorities is that it is a good defence to an action for rent that the tenant has paid the landlord's property tax, though he has not before action produced the receipt to the landlord and obtained his consent to the payment. That being so, I am of opinion that the judgment of Low J. was wrong. It is clear, however, that the defendants ought to have no costs of the action, and the only question is whether they should have the costs of the appeal, but, as an appeal was the only course which the defendants could adopt

(1) (1846) 15 M. & W. 438, 443.
(2) 15 M. & W. 438, 444.
(3) (1812) 4 Taunt. 549.
(4) (1845) 1 C. B. 750.

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to get a wrong decision set right, I think that those costs should be allowed to the defendants.

WARRINGTON L.J. I am of the same opinion, and, as we are differing from Low J., I will add a few words of my own. On March 25, 1917, a quarter's rent became payable under a lease, the plaintiffs being the landlords and the defendants the tenants. On February 9, 1917, the defendants had paid property tax in respect of the property comprised in the lease, and, the rate of the tax being at 5*s.* in the pound, the amount paid was equal to one quarter's rent. The plaintiffs through their agents demanded payment of the quarter's rent; the defendants replied that they had paid the property tax, and though they were politely asked to send the receipt, they declined to do so and said that the plaintiffs must call and see it. The landlords then brought this action for the quarter's rent. It was tried under Order XIV. as a short cause, and the defendants proved payment of the property tax, but Low J. gave judgment for the plaintiffs for the costs of the action. The defendants appeal to this Court.

The contention of the defendants was that in fact no sum of money was due from them at the date of the issue of the writ, and that therefore judgment ought to be entered for them. The Income Tax Acts, 1842 and 1853, have both been cited in argument, and it is immaterial to which we have regard, for they are practically identical in language. I will read s. 40 of the Act of 1853, which is as follows: "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be enti led and is hereby authorized, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable . . . . for every twenty shillings of such payment; and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; and the person to whom such

payment as aforesaid is to be made shall allow such deduction, upon the receipt of the residue of such money, under pain of forfeiting the sum of fifty pounds for any refusal so to do . . . ." Low J. founded his judgment entirely upon the obligation of the landlord to allow the deduction, saying that he could not be bound to do so when it was not shown to him that the payment had been made; but the Acts provide for two things, the liability of the landlord and the liability of the tenant. The words with regard to the liability of the tenant are extremely strong; he is to be "acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid." On the language of the section, by proving that the tax had been paid the defendants proved that the rent had been paid and that it had been paid to the person entitled to demand it. It is clear that the plaintiffs had no cause of action at the date of the writ. I have come to my conclusion quite independently of any authorities, but I think that *Tinckler* v. *Prentice* (1) is a distinct authority that payment of the property tax is a good answer to an action for rent. I agree with Pickford L.J. as to the order which ought to be made: that defendants should have judgment in the action without costs, and that they should have the costs of this appeal.

SCRUTTON L.J. I only add a few words because we are disagreeing with the decision of Low J. Property tax is not directly leviable on the landlord, but by statute a tenant who pays the property tax can pass it on to the landlord. The question for us is whether the landlord can require the tenant to satisfy him that he has paid the tax or whether the tenant can say to the landlord "Find out." This turns on a section of the Income Tax Act as interpreted by subsequent decisions. If it were a question of business convenience or reasonableness, it is obvious that the landlord would be doing a reasonable act in asking for some evidence of payment, as he may have to satisfy a superior landlord of his own. The conduct of the defendants has been thoroughly and utterly unreasonable.

The Act provides that the tenant paying the tax shall deduct so much, and shall be acquitted and discharged of so much money as the deduction amounts to. Three years after the passing of the

(1) 4 Taunt. 549.

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Act of 1806, in *Pocock* v. *Eustace* (1), Lord Ellenborough said: "In such an action as this, the plaintiff must recover the amount of the rent in arrear . . . . It is only on the production of a certificate of the tax being paid that the landlord is bound to make the allowance." Four years later, however, in *Baker* v. *Davis* (2) he mentions the fact that in *Pocock* v. *Eustace* (1) the property tax had not been paid by the tenant at the time of the trial, which shows that his statement in that case about the production of the certificate of the tax being paid was a mere obiter dictum. The cases of *Tinckler* v. *Prentice* (3), *Franklin* v. *Carter* (4), and *Cumming* v. *Bedborough* (5) show that a plea by the tenant of payment of the tax in respect of the rent would have been good without pleading the production of evidence of the payment. It follows that when up to the date of the issue of the writ the tenants refused to produce evidence of payment of the tax they had paid the rent to that extent in advance and nothing was due from them; but I entirely agree that, though judgment must be entered for them, it should be without costs. My difficulty is as to the incidence of the costs of this appeal, and I do not hesitate to say that I should desire to deprive the defendants of them; but it must be remembered that they had a judgment against them which was wrong and against which they had to appeal in order to set it aside; on the whole, therefore, I think we are not entitled to deprive the defendants of the costs of the appeal.

Appeal allowed.

Solicitors for plaintiffs: *Stanley Evans & Co.*
Solicitors for defendants: *Jennens & Jennens.*

(1) (1809) 2 Camp. 181.
(2) (1813) 3 Camp. 474.
(3) 4 Taunt. 549.
(4) 1 C. B. 750.
(5) 15 M. & W. 438.

W. J. B.

ADMIRALTY COMMISSIONERS *v.* PAGE AND OTHERS.

[1918 A. 113.]

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May 29, 30.

Ship—Salvage—Tug requisitioned by Admiralty—Demise of Tug to Crown—Right to Salvage—Ship "belonging to His Majesty"—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 557—*Merchant Shipping* (*Salvage*) *Act*, 1916 (6 & 7 *Geo.* 5, *c.* 41), *s.* 1.

By s. 557, sub-s. 1, of the Merchant Shipping Act, 1894, "Where salvage services are rendered by any ship belonging to Her Majesty or by the commander or crew thereof, no claim shall be allowed for any loss, damage, or risk caused to the ship or her stores, tackle, or furniture, or for the use of any stores or other articles belonging to Her Majesty, supplied in order to effect those services, or for any other expense or loss sustained by Her Majesty by reason of that service . . . ."

By s. 1 of the Merchant Shipping (Salvage) Act, 1916, "Where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in s. 557 of the Merchant Shipping Act, 1894, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty."

A tug belonging to the defendants was requisitioned by the Admiralty upon terms which amounted to a demise of the tug to the Admiralty. The tug rendered salvage services to another vessel in respect of which a salvage award was made:—

Held, that the tug having been demised to the Admiralty was a "ship belonging to His Majesty" within the meaning of s. 1 of the Merchant Shipping (Salvage) Act, 1916, and that therefore the Admiralty, and not the owners of the tug, were entitled to the salvage award.

ACTION tried before Bailhache J.

The defendants' tug, the *Conqueror*, was requisitioned on October 4, 1914, by the Admiralty, acting under the powers conferred by the Proclamation of August 3, 1914, upon the terms of the Expeditionary Force Charterparty, under which the owners had to provide and pay for all wages, provisions, and all other expenses in connection with the officers and crew, and for the insurance of the vessel, while the Admiralty were liable for the expense of all coal and other fuel. The owners were to be liable for sea risk, while the

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Admiralty were liable for war risk. The charter provided that all salvage was to be for owners' benefit, but the ship was to be deemed off hire during the time occupied in salvage operations.

The Director of Transports on September 12, 1916, wrote to the defendants (inter alia) that the basis of hire would be altered from gross to net basis. The defendants on September 13 consented to those terms, but a charterparty providing for that basis of payment was never signed. The form of charterparty providing for payment on net basis was headed "Charterparty . . . . with demise to the Crown," and provided that the vessel while she was on hire would be at the absolute disposal of the Admiralty and under their complete control, and that all risk and expense of vessel, crew, and stores would be borne by the Admiralty, who undertook to restore the vessel to the owners at the termination of her service in the same condition in which she was when taken up, fair wear and tear excepted. The *Conqueror* was thereafter commissioned as one of His Majesty's ships, and was employed at the sole risk and expense of the Admiralty. The master held a commission as lieutenant in the R.N.V.R., and he and the other members of the crew received from the Admiralty and wore uniforms according to their rank, and were paid by the Admiralty.

In January, 1917, while the *Conqueror* was in the possession and control of the Admiralty, salvage services were rendered by the *Conqueror* and other vessels to the steamship *Sussex*, and a claim for remuneration for such salvage services was made by the defendants as owners of the *Conqueror*. It was agreed that the amount to be paid as remuneration for the salvage services should be determined by an arbitrator. The Admiralty claimed that they were entitled to the salvage paid for the services of the *Conqueror*. Eventually it was decided that the amount payable should be decided by the arbitrator without prejudice to the claim of the Admiralty that whatever sum might be awarded was payable to the Admiralty. The arbitrator awarded that the sum of 4500*l.* was due to the owners of the *Conqueror* as remuneration for the salvage services.

The Admiralty Commissioners in this action claimed a declaration that they were entitled to the remuneration earned by the salvage services rendered by the tug *Conqueror* to the *Sussex*, her cargo and

freight, in January, 1917, and assessed at the sum of 4500*l.* by the arbitrator.

MacKinnon K.C. and *C. R. Dunlop* for the plaintiffs. The effect of altering the terms upon which the tug *Conqueror* was being worked from a gross basis to a net basis was to turn the charterparty into a charterparty by demise. Where salvage services are rendered by a ship which is under a charterparty by demise the charterers, and not the owners, are, by the ordinary rule, entitled to the salvage award in respect of those services. Under s. 557, sub-s. 1, of the Merchant Shipping Act, 1894, " where salvage services are rendered by any ship belonging to Her Majesty " no claim can be made by the Admiralty in respect of those services. Sect. 1 of the Merchant Shipping (Salvage) Act, 1916, however, provides that " where salvage services are rendered by any ship belonging to His Majesty and that ship . . . . is a tug, the Admiralty shall, notwithstanding anything contained in s. 557 of the Merchant Shipping Act, 1894, be entitled to claim salvage on behalf of His Majesty for such services." The question whether a ship that has been requisitioned is a " ship belonging to His Majesty " was discussed by the Court of Appeal in *The Sarpen.* (1) Swinfen Eady L.J., after referring to the case of *The Nile* (2), where the question was whether the owners of the *Finisterre*, which had been chartered by the Government, were entitled to salvage, said (3): " Sir Robert Phillimore pointed out that the ship was never demised, and that there was no temporary transfer of her ownership to Her Majesty, and that her owners were therefore entitled to the ship's share of salvage remuneration. The inference from this is that if there had been an actual demise of the *Finisterre* to the Admiralty, and if sea damage had been at the risk of the Admiralty, the ship would have been for the time being 'a ship belonging to Her Majesty' within the meaning of s. 484 of the Merchant Shipping Act, 1854 (now s. 557 of the Act of 1894). This is in accordance with the decision of the King's Bench in 1815 in *Master of the Trinity House* v. *Clark* (4), where Lord Ellenborough delivered the judgment of the Court, which determined that where the ship *Britannia* was under

(1) [1916] P. 306.
(2) (1875) L. R. 4 A. & E. 449.
(3) [1916] P. 313.
(4) (1815) 4 M. & S. 288.

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a time charter to the Crown, which amounted to a demise of the ship, a temporary ownership in the vessel passed to the Crown. In *Weir* v. *Union Steamship Co.* (1) Lord Davey, referring to this case, said that it was decided on very special circumstances and could hardly be a precedent for any other. But the passage which follows indicates that in his opinion, if the contract is one in which the ship is completely handed over to the charterers to be navigated by them at their own risk and responsibility, there would be a transfer of temporary ownership." Pickford L.J. also said (2): "I do not deny that there may be a requisition under such terms as to give the Crown the dominion as well as the control of the ship, and it may be that in such a case she may be said to belong to the Crown, although not in the ordinary sense belonging to it." Bankes L.J. also, after referring to a passage from the judgment of Sir R. Phillimore in *The Nile* (3), said (4): "In this passage Sir Robert Phillimore clearly indicates that in his opinion if there had been a temporary transfer of ownership the *Finisterre* wou'd have become for the time being, and for the purpose of the Merchant Shipping Act and the earning of salvage, a vessel belonging to Her Majesty. In this view I agree." The Admiralty Commissioners are therefore entitled to the salvage award in respect of the salvage services rendered by the *Conqueror*.

R. A. Wright K.C. and *Stuart Bevan* for the defendants. The *Conqueror* was not a "ship belonging to His Majesty" within the meaning of s. 1 of the Merchant Shipping (Salvage) Act, 1916, so as to entitle the Admiralty Commissioners to claim salvage for the salvage services rendered by the *Conqueror*. Those words imply that actual ownership of the ship is in the Crown, whereas the requisition of a ship merely implies a change in the possession of the ship and does not imply a change of property so as to confer upon the Admiralty the right of ownership. There might be a change of property in the ship by a mortgage of the ship, but for this purpose a charter by demise does not have the same effect as a mortgage. The Admiralty Commissioners are therefore prevented by s. 557 of the Merchant Shipping Act, 1894, from claiming salvage in respect of the services rendered by the *Conqueror*.

(1) [1900] A. C. 525.
(2) [1916] P. 317.
(3) L. R. 4 A. & E. 449.
(4) [1916] P. 320.

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MacKinnon K.C. in reply. If the *Conqueror* is not a "ship belonging to His Majesty" within s. 1 of the Merchant Shipping (Salvage) Act, 1916, it is equally not a "ship belonging to [His] Majesty" within s. 557 of the Merchant Shipping Act, 1894, and therefore the ordinary rule that charterers by demise of a ship are entitled to the salvage award in respect of salvage services rendered by that ship would apply.

BAILHACHE J., after stating the facts as to the alteration of the terms upon which the *Conqueror* was requisitioned from gross to net basis, continued as follows: It now becomes material to consider what was the meaning of the alteration in the terms upon which the *Conqueror* was working from gross to net basis. The main alterations were these. Under the earlier arrangement, that is under the Expeditionary Force Charterparty, the master and crew were appointed by the owners; the whole of the wages of the crew and the ordinary expenses of working the ship were borne in the ordinary way by the owners, and the owners were responsible for any repairs required to be done to the *Conqueror*, and if she was laid up during those repairs she came off hire during that period. The Admiralty undertook responsibility for war risks, but the owners remained responsible for marine risks. Under the new arrangement, when the terms upon which the *Conqueror* was worked were altered from gross to net basis, all the expenses of the vessel were borne by the Admiralty: they appointed and dismissed the crew and paid their wages; they were responsible for all repairs other than ordinary wear and tear, and they undertook marine risk as well as war risk; moreover, if the vessel was laid up while she was being repaired there was no cesser of hire during that period. In a word, the difference between the two arrangements was that the earlier charterparty was the ordinary form of charterparty which is not by way of demise, while the subsequent arrangement turned the charterparty into a charterparty by demise. The Admiralty have a special form of charterparty which is called a "charterparty . . . . with demise to the Crown"; that form, however, was not executed in the present case. Under the earlier form of charterparty the owners of the *Conqueror* had the right to salve vessels in distress and to receive any salvage award that might be made for those services;

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time lost during the salvage operations was of course for their account. The form of charterparty by demise says nothing about salvage operations. The legal effect, however, of a charterparty by way of demise is that if salvage services are rendered by a vessel under such a charterparty and an award is made in respect of those services, the money goes, not to the owners, but to the charterers of the vessel. The fact that it was not present to the minds of the owners that by the alteration of the basis of hire of the vessel from a gross to a net basis they would be losing the right to an award for salvage services does not seem to me to make any difference. The legal effect of the change was to transfer the right to any salvage award from the owners to the Admiralty, who were holding the tug on demise.

It was, however, contended by Mr. Wright that the Admiralty are not entitled to succeed inasmuch as s. 557 of the Merchant Shipping Act, 1894, prevents the Admiralty from claiming salvage awards "where salvage services are rendered by any ship belonging to Her Majesty." In 1916, however, the Merchant Shipping (Salvage) Act, 1916, a short Act of one section, was passed, which provided that "where salvage services are rendered by any ship belonging to His Majesty and that ship is a ship specially equipped with salvage plant, or is a tug, the Admiralty shall, notwithstanding anything contained in s. 557 of the Merchant Shipping Act, 1894, be entitled to claim salvage on behalf of His Majesty for such services, and shall have the same rights and remedies as if the ship rendering such services did not belong to His Majesty." It is to be observed that the section only refers to ships which belong to His Majesty, and Mr. Wright argued that a tug which is on time charter to the Admiralty does not belong to the Admiralty in the sense in which the term is used in that section, although the time charter is by way of demise. The matter was discussed by the Court of Appeal in the case of *The Sarpen*. (1) That case was decided before the Act of 1916 was passed. All the Lords Justices in the course of their judgments in that case expressed the opinion that a ship which is on time charter to the Admiralty when the time charterparty operates as a demise may be rightly said to belong to the Admiralty within the meaning of the word "belonging" used in the Merchant Shipping Act, 1894.

(1) [1916] P. 306.

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It is true that that was not the actual point decided in that case, but the matter was discussed, and the learned Lords Justices dealt with it pretty fully, and I should certainly follow those expressions of opinion even if they were obiter dicta in that particular case, and even though I did not agree with them. I, however, entirely agree with the opinions expressed by the Lords Justices In my judgment a tug which is on time charter to the Admiralty when the charterparty is by way of demise is a tug which belongs to the Admiralty for the purposes both of the Merchant Shipping Act, 1894, and also of the Merchant Shipping (Salvage) Act, 1916. It seems to me, therefore, that there is nothing in this case to prevent the ordinary result operating where a vessel is under time charter which operates by way of demise. In such a case, if salvage services are rendered the salvage award goes to the charterer. In my opinion the amount awarded in this case by way of salvage belongs to the Admiralty and not to the owners of the *Conqueror*. There will therefore be judgment for the plaintiffs.

Dunlop asked that the judgment should be with costs as the Admiralty were entitled to costs under s. 5 of the Admiralty Suits Act, 1868 (31 & 32 Vict. c. 78).

Judgment for plaintiffs with costs.

Solicitor for plaintiffs : *Treasury Solicitor.*
Solicitors for defendants : *Thomas Cooper & Co.*

R. F. S.

1918
June 13, 14.

ANDREAE *v.* ZINC MINES OF GREAT BRITAIN, LIMITED.

[1917 A. 1228.]

Company—Issue of Shares—Brokerage—Commission—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 89.

By s. 89, sub-s. 1, of the Companies (Consolidation) Act, 1908, it is lawful for a company to pay a commission to any person in consideration of his procuring subscriptions for shares in the company if the payment of the commission is authorized by the articles and the commission does not exceed the amount or rate so authorized, and if the amount or rate per cent. of the commission is, in the case of shares not issued to the public for subscription, disclosed in a statement as prescribed in the sub-section. By sub-s. 2, save as aforesaid, no company shall apply any of its shares or capital money in payment of any commission to any person in consideration of his procuring subscriptions for any shares in the company. By sub-s. 3, nothing in the section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay.

The articles of association of a private company provided that it should be lawful for the company to pay a commission to any person in consideration of his procuring subscriptions for any shares in the company to any amount not exceeding 5*s.* per share. The company, by a letter signed by their secretary, offered to the plaintiff, who was a feme sole not carrying on any business, a commission of 10 per cent. in consideration of her being the means of providing the sum of 3000*l.* or any other sum that they might accept from her introduction. The amount or rate per cent. of this commission was not disclosed in any statement as prescribed in sub-s. 1. A certain person introduced by the plaintiff advanced a sum of 4600*l.* to the company, who at first proposed to issue debentures but subsequently allotted him 4600 1*l.* shares in respect thereof. The company paid to the plaintiff 200*l.* commission. The plaintiff sued the company for the balance of 260*l.* commission. The company counterclaimed for the 200*l.* paid by them as aforesaid :—

Held, (1.) that the commission was not brokerage within the meaning of sub-s. 3 ;

(2.) that it was commission within sub-s. 1 ;

(3.) that, not having been disclosed in any statement as prescribed by sub-s. 1, it was unlawful under sub-s. 2.

Held, consequently, that the plaintiff could not recover the balance of 260*l.*

Shorto v. *Colwill* (1909) 101 L. T. 598 followed.

Held, also, that the company could not recover the 200*l.* already paid to the plaintiff.

TRIAL of action before Bailhache J. without a jury.

The action was brought to recover the balance of commission

alleged to have been earned by the plaintiff as a financial agent at the rate of 10 per cent. upon a sum of 4600*l.* procured by the plaintiff for the defendants less a sum of 200*l.* paid by the defendants on account.

The plaintiff was a feme sole not carrying on business as a financial agent or otherwise. The defendants were a private company, limited by shares. Their capital consisted of 5000 ordinary shares of 1*l.* each. The objects for which the company was established were stated in paragraph 3 of its memorandum of association, and were, among other things, "to pay all expenses in connection with the promotion and incorporation of the company, and to remunerate any broker, agent, or other person or company for services rendered in placing or assisting to place, or guaranteeing, underwriting, selling or disposing of any of the shares in the company's capital, or any debentures or other securities of the company, or for procuring or obtaining settlements or quotations upon the London or other Stock Exchange."

The articles of association contained the following:—"3. It shall be lawful for the company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company to any amount not exceeding 5*s.* per share."

The commission was claimed under an agreement contained in a letter addressed to the plaintiff and signed by the defendants' secretary in the following terms:—

"October 26, 1916.

"Mrs. Emmeline Andreae.

"Dear Madam,

"In consideration of you providing or being the means of providing the sum of 3000*l.* (three thousand pounds) or any other sum that we may accept from your introduction, we hereby agree to pay commission of 10% (ten per cent.) within one week after the advance has been actually paid to our account, such commission to be paid to you all in cash or cash and shares according to your request.

"We are, Madam, yours faithfully,

"For and on behalf of the Zinc Mines of Great Britain, Limited. Signed W. S. Le Grand, Secretary."

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The plaintiff was acquainted with one Harold John Craig, to whom she mentioned the defendants and their requirements. H. J. Craig advanced 4600*l.*, which was originally intended to be secured by debentures, but in respect of which he was subsequently allotted holdings of 3000 and 1600 1*l.* shares in the defendant company.

The plaintiff sued the company for 260*l.*

Neither the amount nor the rate per cent. of the commission had been disclosed in any statement in lieu of prospectus or statement in the prescribed form as provided by s. 89, sub-s. 1 (*b*), of the Companies (Consolidation) Act, 1908. (1) The defendants contended that the agreement for commission was therefore illegal and void, and they further counterclaimed the 200*l.* which they had paid on account.

Ward Coldridge K.C. and *Wilfrid Price* (for *Croom-Johnson*, serving with His Majesty's Forces) for the plaintiff. A company may lawfully pay a reasonable sum to brokers for commission or brokerage for placing shares: *Metropolitan Coal Consumers' Association* v. *Scrimgeour* (2), and transactions of that nature, of which the present is an example, are saved by s. 89, sub-s. 3, of the Companies (Consolidation) Act, 1908. But even if the present transaction were not within sub-s. 3, an agreement to pay commission to any person in consideration of his procuring subscriptions for shares is lawful under sub-s. 1, if the payment is authorized by the articles and the commission does not exceed the amount so authorized: *Barrow* v. *Paringa Mines* (1909), *Ld.* (3) In the present case the articles of association authorize commission at the rate of 25 per cent. The agreement is for 10 per cent. It is true that sub-s. 1 (*b*) of s. 89 imposes the further condition that the amount or rate per cent. of the commission shall be disclosed in a statement in lieu of prospectus or in a statement in the prescribed form signed and filed with the Registrar of Companies. But this is not a condition precedent. The necessary statement can be signed and filed now.

A. H. Richardson for the defendants. This case is really concluded in favour of the defendants by the decision of Warrington J.

(1) See note on p. 460, post. (2) [1895] 2 Q. B. 604.
(3) [1909] 2 Ch. 658.

in *Shorto* v. *Colwill.* (1) If the contention for the plaintiff is sound, that the condition in sub-s. 1 (*b*) of s. 89 is not a condition precedent, the decision in that case ought to have been the other way. In fact the point was not even raised. There is a difference between a commission, such as is claimed in this case, and brokerage properly so called, or expenses of advertising in the ordinary course. Payments like these were declared to be lawful by s. 8 of the Companies Act, 1900, and are expressly saved by s. 89, sub-s. 3, of the Act of 1908. Payments of commission or agreements to pay commission like that in the present case are avoided by sub-s. 2 unless the formalities prescribed in sub-s. 1 are complied with. [He also referred to *Dominion of Canada General Trading and Investment Syndicate* v. *Brigstocke.* (2)] It follows that the plaintiff must return the 200*l.* which she has been paid.

Ward Coldridge K.C. in reply. There is no difference in principle between brokerage payable to a stockbroker and commission payable to a person who, though not a stockbroker by profession, does the work of a stockbroker.

As to the counter-claim, if H. J. Craig had advanced the 4600*l.* on loan to the defendants, as originally contemplated, the plaintiff would have been entitled to the commission in full. The fact that Craig agreed to take shares cannot debar her from keeping what she has been paid.

BAILHACHE J. If this had been a transaction between the plaintiff and a partnership firm there would be no defence to the action, and the plaintiff would have been entitled to commission on 4600*l.* But it is said that the agreement is illegal under s. 89 of the Companies (Consolidation) Act, 1908, and because of its illegality the directors of the company had no power to authorize the secretary to sign the commission note. I have to decide whether that contention is right or wrong.

It seems that before 1900 it was legal for a company to pay certain sums by way of commission to persons introducing subscribers for shares: see *Metropolitan Coal Consumers' Association* v. *Scrimgeour.* (3) Both the Acts of 1900 and 1908 deal with this question

(1) 101 L. T. 598. (2) [1911] 2 K. B 648.
(3) [1895] 2 Q. B. 604.

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of commission. I have to decide how the matter stands having regard to s. 89 of the Act of 1908. Sub-s. 1 of that section is an enabling clause making it lawful for a company to pay a commission to any person in consideration of his procuring subscriptions for shares in the company if the payment of the commission is authorized by the articles. In the present case the memorandum and articles of association authorized a commission of 5*s.* per share, and the commission claimed is well within that limit. So far the plaintiff is within the enabling provision of the section. Then comes a condition "if the amount or rate per cent. of the commission paid or agreed to be paid is . . . . (*b*) in the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar of companies, and, where a circular or notice, not being a prospectus, inviting subscription for shares is issued, also disclosed in that circular or notice." None of these things has been done. Sub-s. 2 provides that "save as aforesaid, no company shall apply any of its shares or capital money . . . . in payment of any commission. . . . ." Sub-s. 3 protects certain transactions which have always been legal; it provides that "nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay . . . ." It was suggested for the plaintiff that this case is covered by that sub-section. If that is correct the formalities prescribed by sub-s. 1 are not necessary to legalize the transaction; but in my opinion the plaintiff's case does not fall within sub-s. 3. The cases which do are those indicated by Lindley L.J. in *Metropolitan Coal Consumers' Association* v. *Scrimgeour* (1), such as commission to stockbrokers, bankers and the like, who exhibit prospectuses and send them to their customers, and by whose mediation the customers are induced to subscribe. I do not say that the brokerage mentioned in sub-s. 3 is absolutely confined to such transactions as I have mentioned, but those and similar transactions are contemplated by that sub-section. Now it cannot be suggested that what was to be paid to the plaintiff was brokerage. She was in no sense a broker. She did not carry on business as a broker, and it was a mere accident

(1) [1895] 2 Q. B. 604.

that she came into the company's office and was consulted in this matter. In my opinion she does not come within sub-s. 3. She clearly does come within sub-s. 1 and would be entitled if it were not for paragraph (*b*) of that sub-section. No statement in the prescribed form has been filed with the Registrar of Companies. Mr. Ward Coldridge argued that such a statement can be filed at any time, but if that were so the result would be to defeat the object of the Legislature in directing these statements to be filed—namely, that persons seeking information may see on what terms and conditions shares in a company like this have been allotted. If a statement may be filed at any time the true state of the company may not be ascertainable until the company has gone into liquidation, when for the first time it may be discovered that the company has made heavy payments by way of commission. But for the decision of Warrington J. in *Shorto* v. *Colwill* (1) I should, I think, have come to the conclusion that the plaintiff is entitled to be paid. She earned her commission. If she cannot be paid it is not from any fault of her own, but because the company who intended first to secure the loan by debentures changed their method and issued shares. The law when *Shorto* v. *Colwill* (1) was decided was precisely the same as it is now. It is true that s. 8 of the Act of 1907 was not referred to in that case, but in my view that does not affect the question. When I consider who were counsel for the company in that case I cannot think the point, if a good one, would have been missed. In giving judgment Warrington J. said (2): "But the matter does not stop there, because it may be said that without that enabling section, having regard to the provisions of the company's memorandum of association, it would be lawful for the company to pay this commission, if not otherwise prevented. I am not prepared to say that is so, because I doubt very much whether such a commission as this would be one which it would be proper for the company to pay without the express authorization given to it by sub-s. 1 of s. 8"—namely, of the Companies Act, 1900. That seems conclusive against the plaintiff's claim in this case. I cannot distinguish the two cases, and I am bound to follow the decision of Warrington J. The plaintiff's claim therefore fails.

(1) 101 L. T. 598. (2) 101 L. T. 600.

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It is said to follow that she must return the 200*l*. which she has received. I do not agree. If the money had been advanced by way of loan she would have been entitled to commission. She had nothing to do with the change. Unless she had notice that the payment of commission was illegal the money cannot be recovered. She had no such notice, actual or constructive. She is therefore entitled to retain the 200*l*.

Judgment for defendants on claim. Judgment for plaintiff on counter-claim.

Solicitor for plaintiff: *H. C. Mossop.*
Solicitors for defendants: *Guedalla & Jacobson.*

NOTE.—Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 89: "(1.) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission is authorised by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised, and if the amount or rate per cent. of the commission paid or agreed to be paid is—

"(*a*) In the case of shares offered to the public for subscription, disclosed in the prospectus; or

"(*b*) In the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus, or in a statement in the prescribed form signed in like manner as a statement in lieu of prospectus and filed with the registrar of companies, and, where a circular or notice, not being a prospectus, inviting subscription for the shares is issued, also disclosed in that circular or notice.

"(2.) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise.

"(3.) Nothing in this section shall affect the power of any company

to pay such brokerage as it has heretofore been lawful for a company to pay, and a vendor to, promoter of, or other person who receives payment in money or shares from, a company shall have and shall be deemed always to have had power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been legal under this section."

W. H. G.

GRAYS URBAN DISTRICT COUNCIL *v.* GRAYS CHEMICAL WORKS, LIMITED.

1918
June 6, 20.

Fire Brigade—Reasonable Apprehension of Fire—Fire Brigade employed to prevent Outbreak of Fire—Expenses of—Liability of Ratepayer summoning Fire Brigade—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 32.

The right of a ratepayer to the gratuitous services of the local authority's fire brigade under s. 32 of the Town Police Clauses Act, 1847, is not limited to a case in which fire has actually broken out on his premises, but exists whenever there is a reasonable apprehension of fire breaking out of such dimensions that he would be incapable of dealing with it himself. If, on the other hand, the apprehended fire is likely to be only of such small dimensions that he could easily extinguish it himself, so that it would be unreasonable to summon the fire brigade, he must in the event of his doing so pay for their services himself.

His liability in the latter case being a common law liability to pay for services rendered at his request, and not arising under the statute, payment is recoverable in the ordinary Courts and not before a Court of summary jurisdiction under s. 251 of the Public Health Act, with which the Town Police Clauses Act is incorporated.

TRIAL of action before Sankey J.

The plaintiffs were the council of the urban district of Grays in the county of Essex, and under the powers conferred by s. 32 of the Town Police Clauses Act, 1847 (which by s. 171 of the Public Health Act, 1875, is incorporated with that Act), they were possessed of fire engines and appurtenances for the extinguishment of fire and employed firemen for that purpose. The defendants were chemical manufacturers and were possessed of chemical works at Grays in the plaintiffs' district. In February, 1917, they were engaged in

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making large quantities of picric acid for the Ministry of Munitions. On the night of February 5, owing to a heavy fall of snow, the roof of the defendants' nitrating house, a large wooden building measuring 210 feet by 80 feet, collapsed and fell on to carboys containing nitric acid, breaking some of them and releasing their contents. There was consequently great danger of fire from the acid coming into contact with the dry wood from the fallen roof, and if a fire had broken out it would have almost certainly resulted in a very serious explosion, there being upwards of 60,000 lbs. of picric acid on the premises. Under these circumstances the defendants' manager sent for the plaintiffs' fire brigade, who at once came and pumped water upon the debris to prevent an outbreak of fire, and no fire in fact broke out. By the end of the day there was little, if any, further risk of fire except for the possibility of an escape of acid in the course of the removal of the debris. To meet the latter contingency the defendants requested the captain of the fire brigade to leave four of his men on the premises, which he did. The four men remained there until February 11. The others left on the evening of February 5. The judge found as a fact that the risk of fire from the removal of the debris was small and was capable of being dealt with by the defendants themselves. The action was brought to recover a sum of 81*l.* 9*s.* 6*d.* for the services of the plaintiffs' fire brigade and for damage to their uniforms and fire hose by the acid.

A. E. Woodgate for the plaintiffs. The expenses of the attendance of the fire brigade at the defendants' premises fall upon the defendants and not upon the rates. The services were rendered at the defendants' request, and therefore they are prima facie liable to pay for them. The case is outside s. 32 of the Town Police Clauses Act, 1847 (1), for the duty of the local authority under that

(1) By s. 32 of the Town Police Clauses Act, 1847, "The Commissioners may purchase or provide such engines for extinguishing fire, and such water buckets, pipes, and other appurtenances for such engines, and such fire escapes and other implements for safety or use in case of fire . . . . and may employ a proper number of persons to act as firemen . . . . and give such firemen . . . . such salaries and such rewards for their exertions in cases of fire as they think fit."

section is only to provide such services "in case of fire," and here there was no fire but only an apprehension of one.

G. A. Scott for the defendants. The expense must fall upon the rates. There is nothing in the Town Police Clauses Act to impose upon the person summoning the fire brigade a liability to pay for its services where the person so summoning it is a ratepayer of the district. Sect. 33 of that Act provides that where the engines are sent to extinguish fire outside the limits of the district the owner of the premises on which the fire shall have happened shall defray the expense incurred, which warrants the inference that no remuneration is payable to the local authority for expenses in connection with a fire occurring within its own district. In *Bridlington Local Board* v. *Bower* (1), where an action was brought to recover compensation for the services of the plaintiffs' fire brigade on the occasion of a fire on the defendants' premises, which were situate within the plaintiffs' district, the Court of Exchequer "were unanimously of opinion that as it was for the common benefit, and at the common expense of the inhabitants of the district, that means were provided for extinguishing fires, and the statute imposed no obligation to pay for the use of the same, except in the case of the engines being used outside the district, the action was not maintainable." The fact that in this case no fire actually broke out is immaterial. The right of a ratepayer to the use of the local authority's fire engines exists just as much where there is an imminent danger of fire as where a fire has broken out. Secondly, if the defendants are liable to pay for the services rendered the plaintiffs have pursued the wrong remedy. By s. 251 of the Public Health Act, 1875, "All . . . . costs and expenses under this Act" (which includes s. 32 of the Town Police Clauses Act of 1847) "the recovery of which is not otherwise provided for, may be . . . . recovered . . . . before a Court of summary jurisdiction." Although by s. 261 when the demand is below 50*l.* the local authority have the option of proceeding in the county court, where the amount of the demand exceeds that sum they have no corresponding option of proceeding in the High Court, and the only remedy is by summary proceedings.

Cur. adv. vult.

(1) (1873) 38 J. P. 73.

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GRAYS URBAN COUNCIL v. GRAYS CHEMICAL WORKS.

June 20. SANKEY J. read the following judgment:—In this case the plaintiffs claim the sum of 81*l.* 9*s.* 6*d.* for the services of their fire brigade at the defendants' works at Grays in the county of Essex. The main defences to the claim are that as the defendants are ratepayers they were entitled to the services of the fire brigade and are not obliged to pay for them, and that in any event the local magistrates are the tribunal who ought to try the case.

The facts are as follows: The plaintiffs are the urban district council, and by s. 171 of the Public Health Act, 1875, the provisions of the Town Police Clauses Act, 1847, with respect to fires are applicable to them. The material provisions in that Act are ss. 32 and 33, which it will be necessary to examine more closely, but which may be briefly summarized by saying that the first of them empowers the plaintiffs to provide fire engines and firemen, and the second enables them to send the engines and firemen beyond their own area and to charge, in such an event, for their services. The defendants have a munition factory at Grays in the plaintiffs' area, where certain acids are dealt with. Upon February 5, early in the morning, there was a heavy fall of snow which resulted in the roof falling in and breaking some of the vessels in which the acid was stored. There was, in fact, no fire at any time, but if the acids had been left alone they might have ignited the debris, in which event a serious explosion would undoubtedly have occurred and the neighbourhood would have suffered great damage. The defendants' manager sent a constable for the fire brigade, who arrived promptly and pumped water both from the public mains and the defendants' private supply on to the debris. At the end of the day the chief officer of the fire brigade was requested by the manager of the works to leave four members of the brigade with their appliances behind, in order to be handy in case of fire breaking out during the removal of the debris. He consented to do so, and the men remained. On February 10 the managing director wrote to the captain of the fire brigade: "We shall not require the services of your staff after 6 o'clock to-morrow morning." The fire brigade are paid according to a tariff agreed upon between them and the plaintiffs, and the plaintiffs paid to the brigade the sum of 81*l.* 9*s.* 6*d.*, which they now seek to recover from the defendants. Before determining the law

it is necessary to find some additional facts. A number of witnesses were called, and I have come to the conclusion that when the roof fell in there was serious risk of fire, which would have been followed by a disastrous explosion. Although no fire broke out at any time, this risk continued till the end of the first day, but by that time there was no further risk of fire breaking out if the debris had been left as it was. I find it was a reasonable and proper thing, in the interests both of the public and themselves, for the defendants to summon the fire brigade. After the first day there was very small, if any, risk of fire breaking out. The only danger was that during the course of the removal of the debris there might have been a risk of some acid escaping which might have caused a fire ; but this was very unlikely, and although it was undoubtedly wise for the defendants to prepare for any such emergency they would easily have provided for it from their own staff and their own water supply.

What, then, is the law to be applied in such circumstances ? The defendants contend, as above stated, that as they are rate-payers they are entitled under the Act of Parliament to the services of the fire brigade without payment. The plaintiffs say that there never was a fire, that the services were rendered quite outside any Act of Parliament at the request of the defendants, and that they must pay for them. The law is somewhat bare of authority. Sect. 32 of the Town Police Clauses Act, 1847, provides that the plaintiffs may purchase or provide engines for extinguishing fire, together with all necessary appurtenances, and further may provide fire escapes and employ persons to act as firemen. Sect. 33 empowers the plaintiffs to send their engines, appurtenances, and firemen beyond their area, and entitles them to make a charge under such circumstances. *Bridlington Local Board* v. *Bower* (1) decided that it was for the common benefit and at the common expense of the inhabitants of the district that means were provided for extinguishing fires, and the statute imposed no obligation to pay for the use of the same except in the case of the engine being used outside the district. I do not think it possible to construe the section as the plaintiffs wish, namely, that a person is not entitled to the services of the fire brigade unless a fire has actually broken out. Such a con-

(1) 38 J. P. 73.

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Sankey J.

struction would lead to manifest absurdities in the case of s. 32, for until a fire had broken out the plaintiffs would not be empowered to purchase engines. In my view, in the event of a fire, or reasonable apprehension of a fire, a person is entitled to summon the fire brigade of the district, and to have the benefit of their services without paying for them. Such a person has no right to expose his own or his neighbours' premises to risk when he has reason to believe that a fire is about to break out on his own premises. It is not a time to "wait and see." On the other hand, no person has a right to summon the fire brigade needlessly or capriciously when he has no reason for apprehending that a fire will break out; and if he does so, or if he requests the attendance of the fire brigade to perform services which are unnecessary, or which he ought to perform himself, then the ordinary principles of the common law apply, and he is bound to pay for services which have been rendered to him at his request. Applying these principles to the facts before me, I have come to the conclusion that in respect of the first day it was reasonable and proper for the defendants to summon the fire brigade as and when they did, and that they would have been neglecting their own and their neighbours' interests if they had not done so. I am therefore of opinion that they are not bound to pay for the services rendered on the first day. With regard to the remaining period, I am of opinion that the defendants had no such right to the services of the fire brigade. They could and ought themselves to have dealt with the situation. They kept the fire brigade for their own purposes, and are not entitled to throw the cost of the subsequent days' services upon the ratepayers. The figures of the several days were placed before me, and a claim was further made for the damage done to the men's uniforms and the hose by the acids. It is quite impossible to assess the amount accurately, as some of the damage may have been done on the first day, but, giving the best consideration I can to the matter, I think that the plaintiffs are entitled to the sum of 55*l*. With regard to the point that this sum could only be sued for before the magistrates, the defendants relied upon s. 251 of the Public Health Act, 1875, which provides for costs and expenses under that Act, the recovery of which is not otherwise provided for, to be recovered before a Court of summary jurisdiction. Having regard to my finding I am of opinion that these sums are

not costs and expenses under the Act, and the point therefore fails. In the result there will be judgment for the plaintiffs for 55*l.*

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Kingsford, Dorman & Co., for Hatten & Asplin, Grays.*

Solicitors for defendants: *Kirby, Millett & Ayscough.*

J. F. C.

[IN THE COURT OF APPEAL.]

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June 19, 20.

BLACKBURN BOBBIN COMPANY, LIMITED *v.* T. W. ALLEN & SONS, LIMITED.

[1917 B. 722.]

Contract—Sale of Goods—Impossibility of Performance due to Outbreak of War—Discharge.

By a contract made in the early part of 1914 the defendants, who were timber merchants at Hull, sold to the plaintiffs 70 standards of Finland birch timber to be delivered to the plaintiffs free on rail at Hull, deliveries to commence in June or July, 1914, and to continue during the season which would terminate in November, 1914. The contract contained no war or force majeure or suspension provisions. Before the outbreak of war in August, 1914, the practice was to load timber into vessels at Finnish ports for direct sea carriage to England, but this practice was not known to the plaintiffs, nor did they know, as the fact was, that timber merchants in England do not keep Finland timber in stock. Up to the outbreak of the war the defendants had not delivered any of the timber, and after that date, owing to the disorganization of transport caused by the war, it became impossible for the defendants to obtain any Finland timber for delivery to the plaintiffs.

In an action by the plaintiffs claiming damages from the defendants for failure to deliver the timber, the defendants contended that the contract had been dissolved by the outbreak of war:—

Held, that the contract had not been dissolved, and that the defendants were liable in damages for the non-delivery of the timber.

Decision of McCardie J. [1918] 1 K. B. 540 affirmed.

APPEAL from a decision of McCardie J., reported [1918] 1 K. B. 540, where the facts, which are summarized in the head-note, are fully stated.

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McCardie J. gave judgment for the plaintiffs, holding (1.) that the contract had not been dissolved, and that the defendants were liable in damages for the non-delivery of the timber; and (2.) that the contract was not one for the supply of materials "for any building or work" within s. 1, sub-s. 1, of the Courts (Emergency Powers) Act, 1917.

The defendants appealed from the decision on the first point.

MacKinnon K.C. and *Jowitt* for the defendants.

C. Atkinson K.C. and *du Parcq*, for the plaintiffs, were not called upon.

[As the Court held on the facts that the decisions relied upon by the defendants were inapplicable and therefore that it was unnecessary to discuss them, the argument is not set out.]

PICKFORD L.J. This is an appeal from a decision of McCardie J., and the point raised is whether an implication is to be read into the contract the performance of which has been interfered with or prevented by matters arising out of the war. The contract, which contained no exceptions, was for the sale by the defendants to the plaintiffs of 70 standards of Finland birch timber at the price of 10*l.* 15*s.* per standard free on rail at Hull. Before the war it was the regular practice to load the timber on vessels at ports in Finland for direct sea carriage to English ports, and not to send it by rail across Scandinavia and ship it from a Scandinavian port to England. When war broke out the Germans declared timber to be contraband, but, even before that declaration, sailings from Finnish ports had entirely ceased, and therefore the ordinary and normal method of supplying Finland timber came to an end. I will assume that it was not possible, at first at any rate, to get Finland birch timber to England at all, although it is true that in 1916 a certain amount was sent across Scandinavia and shipped from ports there. In August, 1914, and the following months some correspondence took place between the plaintiffs and the defendants as to the timber, the former asking for supplies, and the defendants taking up the position that all pre-war contracts had been cancelled by the war.

The defendants contend that the contract was at an end because

it was in the contemplation of both parties that the defendants should be able to supply the timber according to the ordinary method of supplying it in the trade, and that when that became impossible both parties were discharged from their obligations. We have had a most interesting discussion of the numerous cases where this doctrine has been dealt with, and it is from no disrespect to Mr. MacKinnon's argument that I refrain from going through them, but I refrain from doing so because I accept the principle for which those cases were cited. The principle was thus stated by Lord Haldane in *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (1): "The occurrence itself," i.e. the occurrence preventing the performance of the contract, "may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation." It was also stated thus by Lord Shaw in *Horlock* v. *Beal* (2): "The underlying ratio is the failure of something which was at the basis of the contract in the mind and intention of the contracting parties." In my opinion McCardie J. was right in saying that the principle of these cases did not apply to discharge the defendants in this case. He has found that the plaintiffs were unaware at the time of the contract of the circumstance that the timber from Finland was shipped direct from a Finnish port to Hull, and that they did not know whether the transport was or was not partly by rail across Scandinavia, nor did they know that timber merchants in this country did not hold stocks of Finnish birch. I accept the finding that in fact the method of dispatching this timber was not known to the plaintiffs. But there remains the question, Must they be deemed to have contracted on the basis of the continuance of that method although they did not in fact know of it? I see no reason for saying so. Why should a purchaser of goods, not specific goods, be deemed to concern himself with the way in which the seller is going to fulfil his contract by providing the goods he has agreed to sell? The sellers in this case agreed to deliver the timber free on rail at Hull, and it was no concern of the buyers as to how the sellers intended to get the timber there. I can see no reason for saying—

(1) [1916] 2 A. C. 397, 406. (2) [1916] 1 A. C. 486, 512.

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and to free the defendants from liability this would have to be said —that the continuance of the normal mode of shipping the timber from Finland was a matter which both parties contemplated as necessary for the fulfilment of the contract. To dissolve the contract the matter relied on must be something which both parties had in their minds when they entered into the contract, such for instance as the existence of the music-hall in *Taylor* v. *Caldwell* (1), or the continuance of the vessel in readiness to perform the contract, as in *Jackson* v. *Union Marine Insurance Co.* (2) Here there is nothing to show that the plaintiffs contemplated, and there is no reason why they should be deemed to have contemplated, that the sellers should continue to have the ordinary facilities for dispatching the timber from Finland. As I have said, that was a matter which to the plaintiffs was wholly immaterial. It was not a matter forming the basis of the contract they entered into.

On the facts the nearest case to this is *Ashmore* v. *Cox.* (3) There shipment was to be made by sailer or sailers from a port or ports in the Philippine Islands between May 1 and July 31, 1898. The Spanish-American war prevented the shipment by sailer between the dates mentioned. Lord Russell of Killowen C.J. held that no implied condition was to be imported that it was possible to ship by sailer between those dates. I think that case was rightly decided, and this is an a fortiori case.

For the reasons I have given the defendants have failed on the facts to make out their case that the contract was dissolved. The appeal will be dismissed.

BANKES L.J. I agree. I rest my decision upon the facts of this particular case. No doubt the defendants when they entered into this contract intended to perform it by shipment in the ordinary way, that is, direct from some Finnish port to a port in England, but so far as the plaintiffs are concerned, they knew nothing as to how the timber was brought to this country, whether brought wholly by sea or partly by land and partly by sea. In those circumstances, whether one applies the test laid down by Lord Haldane in the

(1) (1863) 3 B. & S. 826. (1874) L. R. 10 C. P. 125.
(2) (1873) L. R. 8 C. P. 572; (3) [1899] 1 Q. B. 436.

Tamplin Case (1), or that laid down by Lord Shaw in *Horlock* v. *Beal* (2), or whether it is said that performance became impossible as that expression is found in the judgment of Hannen J. in *Baily* v. *De Crespigny* (3), or whether the matter is treated as one to which the principle of an implied condition as explained by Lindley L.J. in *Turner* v. *Goldsmith* (4) applies—whichever of these is the correct method—or whether all these tests are applied, the result is the same, because the facts are not such as to bring the defendants within the principle of any of the cases relied upon on their behalf. In my view the judgment of McCardie J. was right.

WARRINGTON L.J. I am of the same opinion. I also think that this case is to be decided on its own facts. In order to succeed the defendants must prove, to use the words of Lord Shaw in *Horlock* v. *Beal* (2), a "failure of something which was at the basis of the contract in the mind and intention of the contracting parties." In the present case what is alleged to have failed is the normal mode of transport of the subject matter of the contract from Finland to this country. It was not proved that the continuance of that normal mode of transport was at the basis of the contract in the mind and intention of the contracting parties. The contract was merely for the sale and delivery of a certain quantity of Finland birch squares free on rail at Hull. The judge has found as a fact, and I see no reason for upsetting that finding, that the plaintiffs were unaware, at the time of the contract, of the circumstance that the timber from Finland was shipped direct from a Finnish port to Hull. They did not know whether the transport was or was not partly by rail across Scandinavia, nor did they know that timber merchants in this country did not hold stocks of Finnish birch. It seems to me, therefore, that the normal mode of transport was not in fact in the mind and intention of the plaintiffs, and I see no reason for holding that that normal mode must be deemed to have been in their mind and intention. I do not deal in detail with the argument of Mr. MacKinnon or with the elaborate review of the cases by McCardie J., because in the view I take it is unnecessary to do

(1) [1916] 2 A. C. 397, 406.
(2) [1916] 1 A. C. 486, 512.
(3) (1869) L. R. 4 Q. B. 180.
(4) [1891] 1 Q. B. 544.

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so. For the reason I have given I agree that the judgment of McCardie J. should be affirmed.

Appeal dismissed.

Solicitors for plaintiffs: *Gibson & Weldon, for H. Worden, Blackpool.*

Solicitors for defendants: *Trinder, Capron & Co.*

J. S. H.

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June 25, 26.

[IN THE COURT OF APPEAL.]

In re AGRICULTURAL HOLDINGS ACT.

In re ARBITRATION BETWEEN LANCASTER AND MACNAMARA.

Agricultural "Holding"—Landlord and Tenant—Lease of Premises comprising Inn and Pastoral Land—"Parcel of land . . . . either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral"—Expiration of Tenancy—Compensation for Improvements—Agricultural Holdings Act, 1908 (8 *Edw.* 7, *c.* 28), *s.* 48.

Where under a single agreement of tenancy at an entire rent a farm is let together with an inn upon which a business entirely separate from the farm is carried on, the subject of the letting is not a "holding" within the meaning of s. 48 of the Agricultural Holdings Act, 1908, in respect of which the tenant is entitled, on the expiration of his tenancy, to claim compensation for improvements under the Act.

APPEAL from a decision of the judge of the Burnley County Court upon a special case stated by the arbitrator in an arbitration under the Agricultural Holdings Act, 1908.

The special case stated that in 1896 Valentine Lancaster became tenant of the Ram Inn, Cliviger (a fully licensed public-house), together with the outbuildings belonging thereto, and also a cottage and certain shippons, stables and barns, and certain fields of meadow and pasture land, the whole comprising an area of 86 acres. The whole of the above premises and land were let on an undivided tenancy at an annual rent of 171*l.* There was no written agreement setting forth the terms of the tenancy. The respective rateable

values of the hereditaments included in the tenancy were : The inn, 32*l.* ; the buildings (other than the inn), 10*l.* ; and the land, 102*l.* 5*s.* The tenancy was an annual one from April 6 in each year as to the land, and from May 1 as to the Ram Inn, cottage, and other buildings.

On May 1, 1916, the tenant, in pursuance of a notice served upon him by the landlord, quitted the premises. On June 28, 1916, the tenant served upon the landlord a claim for compensation due to him under the provisions of the Agricultural Holdings Act, 1908, on quitting the premises and land.

Upon the hearing of the arbitration the landlord objected to the proceedings on the ground that the premises comprised in the tenancy were not a "holding" within the Act, and asked that a case might be stated for the consideration of the county court as provided in Sched. II., r. 9, of the Act.

The tenant contended that the lands in respect of which compensation was claimed constituted a "holding" within the meaning of the Act. The question for the Court was which of these contentions was correct in law. The county court judge came to the conclusion that the contention of the tenant was correct in law.

The landlord appealed.

Eustace Hills for the appellant. The question to be decided upon the special case was whether the subject of this letting as a whole was or was not a "holding" (1) within the meaning of the Act. The county court judge decided that it was, on the ground that because the demised premises were mainly "pastoral" therefore the whole was "pastoral." It is submitted that he was wrong. A letting may be a "holding" within s. 48 even if it has a building upon it, if the building is merely accessory to the land. If, however, the land is accessory to the building it is not a "holding" within the section. The interpretation of the section with reference to given

(1) Sect. 48, sub-s. 1, of the Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), defines "holding" to mean "any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord."

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premises is to a certain extent a question of fact. Here the only connection that the 86 acres have with the inn is that the same person is the tenant of both. Assume that the tenant carried on the business of a farmer on these 86 acres, still the letting would not be a "holding" within the section. When once you establish a separate business on part of the land you cannot bring yourself within the definition.

[SWINFEN EADY M.R. The question is whether there is a real and substantial business carried on at the inn.]

The inclusion of a licensed house is sufficient to prevent the letting from coming within s. 48. The tenant here was taking two subjects, the inn and the land. It is for him to show that he comes within the section, notwithstanding that there are certain buildings included in the letting. If he in fact carries on two businesses one of which he carries on in the inn, he is outside the Act. The Act was intended to apply to persons who carried on business as agricultural tenants and to them only. Here a substantial business is carried on at the inn. It is submitted, therefore, that the land was accessory to the inn.

There is no reported case which affords much assistance on the point. *Mackintosh* v. *Lord Lovat* (1) was a decision upon s. 35 of the Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), which is in practically the same terms as s. 48 of the Act of 1908, except that the definition is expressed in a negative form. It was there held that the Act did not apply to the case of an hotel and 33 acres of land let together as one subject. That was followed in *Taylor* v. *Earl of Moray* (2), where it was held that the Scottish Act of 1883 did not apply to subjects of about three quarters of an acre in extent, one third of which was occupied as a dwelling-house and garden and the remainder as a grass park,—the rent of the whole being 3*l.*, and the annual value of the land being 15*s.*—in respect that the house and garden were the principal subjects and not accessories to the land, and could not be regarded as either agricultural or pastoral. *Black* v. *Clay* (3) was a decision as to compensation for improvements under s. 7 of the Scottish Act of 1883, and is not either in favour of or against the appellant. It is well settled that there

(1) (1886) 14 R. 282. (2) (1892) 19 R. 399.
(3) [1894] A. C. 368.

may be buildings attached to the land. *Wight* v. *Earl of Hopetoun* (1) was there distinguished.

[SWINFEN EADY M.R. That case merely goes to the time within which the option to renew the lease must be exercised.]

The county court judge has gone wrong in looking closely to see whether the main portion of the letting was pastoral or agricultural. He referred to clause 27 of Part III. of the Schedule to the Act of 1908. That part enumerates the improvements in respect of which consent of or notice to the landlord is not required. Clause 27 is "Repairs to buildings, being buildings necessary for the proper cultivation or working of the holding, other than repairs which the tenant is himself under an obligation to execute." That definition only applies to buildings necessary for the proper working of the holding. It does not contemplate that there would be other buildings on the land which were not necessary for the proper cultivation of the land.

Throughout the Act the word "holding" is treated as meaning the whole subject of the tenancy. The point is whether the letting as a whole is or is not a "holding" within the meaning of the Act. That was the point left to be determined by the special case. The county court judge held that because the subject of the tenancy was mainly pastoral, therefore it came within the definition in s. 48. His decision cannot be supported. [*In re Paul* (2) and Woodfall on Landlord and Tenant, 1st ed., p. 41, were also referred to.]

H. Hanbury Aggs for the respondent. It is said that the word "holding" must be treated as applying to the whole subject-matter of the demise, but in certain parts of the Act the word is not so used: s. 5; s. 6, sub-s. 2; ss. 22, 23, &c. It is submitted that a "holding" may mean every separate piece or parcel of land comprised in the tenancy.

SWINFEN EADY M.R. This is an appeal from the judgment of the county court judge at Burnley upon a case stated between landlord and tenant under the Agricultural Holdings Act, 1908. It appears that there was a contract of tenancy subsisting in respect of certain hereditaments at Cliviger, near Burnley. The parcels comprised in the letting are set out in paragraph 1 of the special case, which says: "Valentine Lancaster (hereinafter called the tenant) became

(1) (1864) 4 Macq. 729. (2) (1889) 24 Q. B. D. 247.

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tenant in 1896 of the Ram Inn, Cliviger (a fully licensed public-house), together with the outbuildings belonging thereto, and also a cottage and certain shippons, stables and barns, and certain fields of meadow and pasture land, the whole comprising an area of 86 statute acres or thereabouts." The rent was 171*l.*, payable half-yearly. There was no written contract of tenancy. The case states that the rateable value of the hereditaments comprised in the letting was as regards the inn 32*l.* a year, and as regards the other buildings 10*l.* a year, and as regards the land 102*l.* 15*s.* : so that the rent was 171*l.*, and the rateable value amounted to 144*l.* 15*s.* It was an annual tenancy running as regards the land from April 6, and as regards the buildings from May 1. The buildings extended to and included the Ram Inn, the cottages, the barns, the stables and other buildings. On January 13, 1915, the landlord gave to the tenant notice to quit. Pursuant to the notice the tenant quitted the land on April 6, and the buildings on May 1, 1916. On June 28, 1916, the tenant served notice of a claim upon the landlord under the provisions of the Agricultural Holdings Act, 1908, for compensation due to him on quitting the premises and the inn. Then a question arose between the parties as to the right of the tenant to claim compensation under the Act, and the matter went to arbitration. The arbitrator, who was appointed by the Board of Agriculture and Fisheries, at the request of the parties stated a case for the opinion of the Court. Paragraph 12 of the special case says : " The arbitration was opened at Burnley on December 18, 1917, when the landlord through his solicitor (Mr. Fullalove) took a formal objection to the arbitration proceedings on the ground that the inn, buildings, and land comprised an undivided letting at a single rent of an inn with lands attached and consequently were not a holding within the meaning of the Agricultural Holdings Act, 1908, as defined by that Act, and asked that a case be stated for the consideration of the county court as provided in Sched. II., r. 9, of the Act." Then the tenant disputed the proposition. " The tenant through his solicitor (Mr. Creeke) contended that the lands in respect of which compensation is claimed constituted a holding within the meaning of the Act." The matter went before the county court judge, and he answered the question raised by the special case—which is, " Which of these contentions

is correct in law ? "—by saying that the contention of the landlord was not correct in law and that the contention of the tenant was correct in law.

The case comes to this Court under the provisions of s. 13 of the Agricultural Holdings Act, 1908, which provides for the procedure in arbitration and for a case being stated. Sect. 13, sub-s. 3, says: "If in any arbitration under this Act the arbitrator states a case for the opinion of the county court on any question of law, the opinion of the court on any question so stated shall be final, unless within the time and in accordance with the conditions prescribed by Rules of the Supreme Court either party appeals to the Court of Appeal, from whose decision no appeal shall lie." Then, by sub-s. 4, the Arbitration Act, 1889, shall not apply to any arbitration under this Act. It is under sub-s. 3 that the appeal is presented to the county court judge, and we have only to consider the special case and the questions raised by it, and to pronounce our opinion upon those questions

The landlord's contention as set out in the special case was this: Here is a considerable tract of land, some 86 acres altogether, with substantial farm buildings upon it; but as part of the holding, and let with the land at an entire rent, there is an inn, which is also a considerable undertaking. As I gather, after the hearing, but before the judgment of the learned county court judge, the parties agreed upon a plan and a short statement of two or three additional facts being laid before him and to their being treated as part of the special case. The statement merely names the buildings, but the plan gives details of certain of the farm buildings and all the inn buildings. The plan shows that the inn is of considerable size, with not only a taproom, bar and bar-parlour, but a very large dining-room at the back capable of division into two parts by means of a movable partition. On the first floor there is a clubroom of some 33 feet length by 13 feet to 17 feet width, so that it is a room of very considerable size. Also on the first floor there are four bedrooms. In addition to that there is the ordinary accommodation on the ground floor, a living room, pantry, and so forth. The plan therefore shows that it is an inn of considerable size. It was fully licensed and the licence was in existence at the time of the demise, the premises being let as fully licensed premises.

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The question is whether, where there is comprised in one tenancy an inn or place of business whereon a business entirely separate from a farm is carried on, and with the inn there is let some land and farm buildings, the premises comprised in such a tenancy constitute a "holding" within the provisions of the Agricultural Holdings Act, 1908? That Act by s. 48, sub-s. 1, defines a "holding" in this way: [The Master of the Rolls read the section, and continued:] In this case no question with regard to market garden arises, nor with regard to any office, employment, or appointment held under the landlord; therefore I pass those words by. The question is whether the subject of this tenancy comes within the definition of a parcel of land wholly pastoral; it is not suggested that there is any agricultural land; the land is pasture and meadow—that is to say, pastoral. Can the holding be said in this case to be a parcel of land wholly pastoral? It is quite obvious that "land" will include buildings upon it. That would come within the interpretation: naturally, for most, if not all, agricultural purposes there would be certain buildings on the land, and I treat the ordinary farmhouse or dwelling-house and cottages as part of the agricultural buildings. It seems to be equally clear that where there is an inn of considerable size forming an important part of the demised premises, having regard not only to the separate trade carried on there, but also to the rateable value, it cannot be said that the holding is wholly pastoral, even assuming that all the land is wholly pastoral. By no stretch of the imagination can it be said that this inn upon which the trade of a licensed victualler is being carried on is a pastoral holding. Mr. Aggs endeavoured to escape from that difficulty by arguing that you must read "ho'ding" as if it meant every separate parcel of land; that every piece or parcel of land could be separated from any other piece or parcel of land, and, if there was any portion of land part of the premises comprised in one demise that could be said to be agricultural or pastoral, that separate portion of land was a "holding"; and it was in that sense that the word "holding" was used throughout the statute. It seems to me that it is quite impossible to read the statute without seeing that that is not the sense in which the word "holding" is used throughout. The word "holding" is used as meaning the entire holding of the tenant, the entire premises all the premises comprised in a particular demise:

those together constitute the holding. Where the statute refers to a separate part of the holding it says so in terms and distinguishes the part of the holding from the entire holding. But apart from that it speaks of "holding" in terms which show that it means all the premises comprised in a demise. Sect. 1 says: "Where a tenant of a holding has made thereon any improvement comprised in the First Schedule of this Act." That obviously means he has made an improvement on his holding, and that extends to every part of his holding. Sect. 13, which provides for the arbitration proceedings, provides by sub-s. 2: "Where any claim which is referred to arbitration relates to an improvement executed or matter arising after the determination of the tenancy, but while the tenant lawfully remains in occupation of part of the holding, the arbitrator may, if he thinks fit, make a separate award in respect of that claim." That is to say, where a tenant lawfully holds over under a custom of the country part of the premises comprised in his demise, that is referred to as the tenant remaining "in occupation of part of the holding"; that is not treating that as an entire and separate holding, because he is entitled to retain possession of it after his tenancy of other parts of it has expired, but it treats it as part of the holding—that is to say, part of one entire holding. Then s. 16 says: "The sum charged by the order of the Board under this Act shall be a charge on the holding, or the part thereof charged"; that obviously refers to the use of "holding" in the sense of all the demised premises. Sect. 22 provides for the notice to quit: "Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for the determination of a tenancy of a holding from year to year"; that again, in my judgment, refers to the whole holding. Sect. 23 enables a landlord to resume possession of part of demised premises comprised in one entire letting, but only for certain limited purposes. It provides: "Where a notice to quit is given by the landlord of a holding" (that is, an entire holding) "to a tenant from year to year with a view to the use of land for any of the following purposes"—then the purposes are set out—"and the notice states that it is given with a view to any such use—(*a*) it shall, by virtue of this Act, be no objection to the notice that it relates to part only of the holding; and (*b*) the provisions of this Act respecting compensation shall apply as if the part to which the notice relates were a

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separate holding ; . . . . Provided that the tenant may at any time within twenty-eight days after service of the notice to quit serve on the landlord a notice in writing to the effect that he accepts it as a notice to quit the entire holding." That section clearly draws a distinction between a part and the whole. In the first instance it uses " holding " in the sense of all the premises comprised in the demise ; it then enables a landlord to state the purpose with which the notice is given, when it may relate to part only of the holding ; and then there is provision for compensation as if the part were a separate holding. Then s. 26 gives to a tenant freedom of cropping, and provides that a tenant of a holding shall have full right to practise any system of cropping of arable land " on the holding." Sect. 27 says : " If at the commencement of a tenancy of a holding entered into after the commencement of this Act either party so requires, a record of the condition of the buildings, fences, gates, roads, drains, ditches, and cultivation of the holding shall be made." I only refer to these out of other sections to show that " the holding " is used throughout the statute as meaning the premises comprised in one demise, and if that demise of land is wholly agricultural, or wholly pastoral, or in part agricultural and as to the rest pastoral, it falls within the definition in the statute. But if the holding is not within that description, then in my opinion it does not fall within the statute.

Cases to that effect have been already decided to which our attention has been drawn, and one case was *Mackintosh* v. *Lord Lovat.* (1) That was the case of the demise of an hotel and 33 acres of land and also of a new hotel built adjoining to the old hotel. It was held by the Court of Session that such a holding was not within the provisions of the Agricultural Holdings (Scotland) Act, 1883, the provisions of which are very similar to the Act which we have now to construe. The Lord President, after referring to the Act, said : " This Act shall apply only to a holding which is wholly agricultural or wholly pastoral. The meaning would be exactly the same, and it makes it abundantly clear that the intention was that the Act should apply to agricultural and pastoral subjects, and not to anything of the nature of urban or house property. The subject here is a hotel with one or two fields consisting of 33 acres—five of which were rough

(1) 14 R. 282, 284.

pasture—adjoining." Then he says: "The argument under the 42nd section of the Act"—that is, the definition section there—"affords no aid to the reclaimer, because all that is there expressed is that 'holding' means any piece of land held by a 'tenant.' It seems to me that the interpretation here given stands as much in need of interpretation as the interpreted. If a holding means only a piece of land held by a tenant, then the 35th section provides, that no piece of land held by a tenant shall be subject to the Act unless it is wholly agricultural or wholly pastoral." He agreed with the view expressed by the Lord Ordinary that the holding was not a "holding" within the terms of the Agricultural Holdings (Scotland) Act, and Lord Mure and Lord Adam concurred. That case was followed in the case of *Taylor* v. *Earl of Moray* (1), which was said to be an a fortiori case.

In my judgment, where you have a holding comprising substantial business premises with a going business as part of one demise, although a farm and lands are let with it, such a holding is not within the provisions of the Agricultural Holdings Act. For these reasons I am of opinion that the view taken by the learned county court judge was erroneous. I think that the appeal should be allowed, and that the special case should be answered by saying that the contention of the landlord was correct.

Scrutton L.J. I have come to the same conclusion, but, as we are differing from the learned judge below, I will express my reasons in my own words.

We are exercising a statutory jurisdiction under the Agricultural Holdings Act, under which, on special case, the Court of Appeal is the final court of appeal from the county court judge who deals with the special case stated by the arbitrator. The way in which the case has arisen is this: A tenant under one agreement of tenancy at an undivided rent is in possession of an inn called the Ram Inn and a farm called the Home Farm, with different dates of termination of the period of tenancy for the two subject-matters. On quitting the subject-matter of the agreement of tenancy he has claimed compensation under the Agricultural Holdings Act. The landlord has replied: "Your holding is not a matter to which the Act applies,

(1) 19 R. 399.

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and therefore you are not entitled to compensation." The arbitrator has stated a special case in which he sets out the contention of the landlord and the contention of the tenant, and asks the Court which contention is correct. The learned county court judge has decided, for reasons which I will state, that the tenant's contention was correct. The question for the Court is whether the learned county court judge was right.

In order to see whether the tenant was entitled to compensation one has to look at the Agricultural Holdings Act, 1908, where we find that a person who is entitled to compensation is a tenant of a holding who fulfils certain conditions. We then turn to the definition clause to see who is the tenant of a holding, and we find that a holding is "any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral."

It was argued before the learned county court judge, and it has been argued before us, that "any parcel of land held by a tenant" means any piece of land which a tenant holds under the same agreement by which he holds other pieces of land, and that therefore, if you have a tenant who under one agreement holds a large piece of land on half of which he carries on a manufacturing business and on the other half of which he carries on a pastoral business, he may treat the part of the land which he uses for pasture as a holding which entitles him to compensation. If I were to look at the reasons of things I am bound to say that I see no particular reason why he should not have agricultural compensation for such a piece of land which he holds as pasture. But, after all, what I have to decide is not whether I think it reasonable, but whether the statute has given him a right. Looking at the statute, I think it is clear that throughout the word "holding" is used as applicable to the whole of the land held under one agreement of tenancy. Where the statute needs to talk about part of a holding it does so. It continually contrasts part of a holding with the whole holding. It sometimes speaks of part as if the part to which the notice relates were a separate holding, meaning it is not a separate holding because it is held under a separate agreement of tenancy. On that point, which has been argued before us and before the learned county court judge, I am of opinion that you cannot apply the term "parcel of land" to a piece of the land

or part of the land which is let under one agreement of tenancy. One has therefore to look at the whole land held under this agreement of tenancy at an undivided rent and see whether it comes within the definition. I think the definition, for some reason which it is not necessary to inquire into, clearly limits holdings to holdings which are wholly devoted to agriculture and/or pasture. I imagine that in dealing with the question of fact as to whether a holding was wholly devoted to agriculture and/or pasture you would disregard infinitesimal things. The mere fact that a farmer sold tea to visitors, or that a farmer's wife had a small sweetstuff shop in one room of the farmhouse, would be disregarded. It would be a negligible matter which would not stop the land being wholly devoted to pasture. But if you find any substantial part of the land used for a purpose which is neither agricultural nor pastoral, Parliament for some reason, into which I have not troubled to inquire, has not thought right, in my view, to give compensation either in respect of the whole land, or in respect of that part of it which is wholly devoted to pasture.

I have had some little difficulty with the terms of the case on this point, because I am not clear what the arbitrator intends to state. He stated the contention of the tenant: "The tenant . . . . contended that the lands in respect of which compensation is claimed constituted a holding within the meaning of the Act," and he did not state in respect of what land compensation was claimed. He stated that there was a notice of claim which, as he has recited it, we should have been entitled to look at had either party provided us with a copy in order that we might look at it. But no such copy has been provided, and therefore we are in the dark as to what was claimed. Neither is there any express finding in the case as to the extent of the business done in the inn except this, that by agreement between the parties we can look at the plan, which shows that the inn has a fairly large dining-room and clubroom, and we are told that its rateable value is 32*l.* as compared with about 100*l.* the rateable value of the land.

I am bound to say that on those facts I cannot see how this case can be argued except upon the supposition that a substantial portion of the value of the property is derived from a business which is neither agricultural nor pastoral, but which is the business of a

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licensed victualler. The learned county court judge has ended with the finding that the land is wholly pastoral, but he has worked up to that conclusion by finding that the inn was not the principal subject of the letting. I think, with great respect to him, that he has treated "wholly" as if it were "mainly," or "principally." There is no justification for that construction in the language of the statute, which appears to me to contemplate that the land must be used entirely, with buildings on it, for agriculture and/or pasture.

For these reasons I do not think that the learned judge was justified on the special case in drawing the inference that the land forming the subject-matter of the tenancy was "wholly pastoral." That being so, I think the contention of the landlord was the correct one, and that the question asked in this case must be so answered.

DUKE L.J. I am of the same opinion. The Agricultural Holdings Act, 1908, by its first section confers certain rights on a tenant of a holding at the determination of a tenancy. On quitting his holding the claimant in the case, the present respondent, made his claim upon the present appellant upon the ground that he was tenant of a holding within the meaning of the Agricultural Holdings Act, 1908. If being tenant of agricultural land which was comprised in the holding qualified him within the meaning of the Act, then he was entitled to maintain his claim; but if the Act dealt with the holding as one entire subject-matter, then, in my view, he was not so entitled. The case went to the learned county court judge and after reading the learned judge's notes I have come to the conclusion that he was of opinion that the true test was whether the subject of the tenancy was as a whole a holding within the meaning of the Act. The learned judge arrived at the conclusion that it was such a holding upon a ground of fact which seems to me not sufficient to sustain it. The learned judge, speaking of the inn and contrasting it with the remainder of the holding, says: "The Ram Inn in my view was not the principal subject of the letting in the present case. The principal subject was the land which is wholly pastoral in character." That seems to me to treat the Act as conferring the right to compensation, not in respect of holdings which are wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, but as conferring the right to compensation where the holding is neither

wholly agricultural nor wholly pastoral, nor as to part of it agricultural and as to the residue pastoral, but where in fact it is mainly agricultural or mainly pastoral. The learned judge seems to me to have arrived at the facts which he has found upon a conclusion which cannot be sustained on the interpretation which I think he applied to the definition clause of the Agricultural Holdings Act. Counsel for the respondent in this case felt this difficulty, because he did not maintain that premises which answer the description given by the learned county court judge are premises in respect of which the claim for compensation can be sustained. He put forward a much bolder argument, and it was that under the Agricultural Holdings Act, upon a proper understanding of the Act, any close, or part of a close, may be treated as a separate holding, although it is not the separate subject of a contract of tenancy. He said it may be as small an area as you please, and I think he accepted the conclusion that the test must be the use to which a particular area of land is applied. Although that is an attractive argument, and, as my brother Scrutton says, there are many who are unable to see why the use of land for agricultural purposes should not be the proper test, yet I am satisfied that, reading the Act as a whole, the Legislature did not intend to give the right to compensation in respect of the use of particular areas in a particular holding, but only where the whole subject-matter of the tenancy came within the definition clause of the Act.

Upon those grounds I think that this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Littledale & Lefroy, for Southern, Fullalove & Ritchie, Burnley.*

Solicitors for respondent: *W. J. & E. H. Tremellen, for Roberts, Riley, Creeke & Hudson, Burnley.*

G. A. S.

C. A.
1918
June 26.

[IN THE COURT OF APPEAL.]

NAYLOR, BENZON & CO., LIMITED *v.* KRAINISCHE INDUSTRIE GESELLSCHAFT.

[1917 N. 56.]

Contract—Illegality—Alien Enemy—Suspension Clause—Dissolution—Public Policy.

By a contract made before the war the plaintiffs, a British firm, agreed to sell, and the defendants, an Austrian firm, agreed to buy, certain iron ore at a price to include cost, freight, and insurance to Servola, near Trieste, payable in cash on receipt of invoice for each shipment. Delivery was to be in about equal quantities in two years, and shipments were to be at as regular intervals as could be arranged. The contract contained a suspension clause providing that in case of stoppage of mines or works or of loss or delay during transit owing to accidents, strikes, lock-outs, wars, civil commotions, epidemics, quarantine, dangers of the sea, or any other cause beyond the control of the sellers or the buyers, deliveries might be wholly or partially suspended by the sellers or the buyers during the continuance of the same without liability, but the buyers undertook to receive any quantities for which the sellers should have engaged freight before receiving advice of the stoppage. The contract also contained an arbitration clause providing that any dispute arising out of the contract was to be referred to arbitration in London. After a part of the ore had been delivered war was declared between the United Kingdom and Austria-Hungary. The plaintiffs claimed a declaration that the contract was dissolved by the existence of a state of war between this country and Austria-Hungary, and that the plaintiffs were released from any obligation to make further deliveries thereunder to the defendants:—

Held, that the contract was dissolved on the outbreak of war.

Ertel Bieber & Co. v. *Rio Tinto Co.* [1918] A. C. 260 applied.

Decision of McCardie J. [1918] 1 K. B. 331 affirmed.

Appeal from a decision of McCardie J.

The facts, which are summarized in the head-note, are fully stated in [1918] 1 K. B. 331.

McCardie J. held (1.) that, apart from the suspension clause, the contract was dissolved from the date of the declaration of war; (2.) that the suspension clause made no difference in that respect (*a*) because the war now being waged was not such a war as was provided for by that clause; (*b*) because, even if it were, the clause

only provided for postponement of deliveries until the end of the war and left the other terms of the contract, including the arbitration clause, in force during the war; and (3.) that, assuming that the suspension clause operated to postpone all contractual rights and duties till the end of the war, the contract was none the less dissolved (*a*) through the alteration caused by the war in the circumstances contemplated by the parties as the basis of the contract, and (*b*) on grounds of public policy.

The defendants appealed.

Le Quesne for the defendants formally took the points taken by him before McCardie J. and referred to *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1), which was decided by the House of Lords two days after the judgment of McCardie J. in this case.

Leck K.C. and *Stuart Bevan* for the plaintiffs.

PICKFORD L.J. After the judgment of the House of Lords in *Ertel Bieber & Co.* v. *Rio Tinto Co.* (1) this case is unarguable. The appeal will therefore be dismissed.

BANKES and WARRINGTON L.JJ. concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Lawrance, Webster, Messer & Nichol's.*
Solicitors for defendants: *Waltons & Co.*

(1) [1918] A. C. 260.

J. S. H.

C. A.
1918
July 2.

[IN THE COURT OF APPEAL.]

ASHTON & CO. *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Carrier—Carriage of Goods—Value and Nature of Goods not declared—Transit partly by Land and partly by Sea—Loss of Goods—Onus of Proof—Carriers Act, 1830 (11 *Geo.* 4 *&* 1 *Will.* 4, *c.* 68), *s.* 1.

Three packages of furs, each of which exceeded 10*l.* in value, were delivered by the plaintiffs to the defendants for carriage from London to Belfast, part of the transit being by land and part by sea. The plaintiffs made no declaration as to the nature and value of the goods, as required by s. 1 of the Carriers Act, 1830. The goods could not be traced beyond Euston Station, but there was no evidence as to when or where they were lost. The defendants relied upon s. 1 of the Carriers Act, 1830, as a defence to an action by the plaintiffs for the value of the goods:—

Held, that the Carriers Act did not protect the defendants, inasmuch as that Act only afforded protection to the carrier where the goods were lost by land, and the defendants had failed to show that the goods were lost during the land portion of the transit.

Decision of the Divisional Court [1918] 1 K. B. 488 affirmed.

Appeal from the Divisional Court affirming a decision of the judge of the Bloomsbury County Court; reported [1918] 1 K. B. 488.

The plaintiffs in September, 1916, delivered to the defendant railway company at their receiving office in Knightrider Street three packages of fur coats for carriage from London to Belfast, part of the transit being by land and part by sea. The plaintiffs made no declaration as to the value and nature of the goods, as required by s. 1 of the Carriers Act, 1830. (1) The parcels were

(1) Carriers Act, 1830, s. 1: "No . . . . common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following; (that is to say) . . . . furs . . . . contained in any parcel or package which shall have been delivered, ... to be carried for hire . . . . when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such . . . . common carrier . . . . for the purpose of being carried . . . . the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as here-

taken by the defendants from the receiving office to Euston Station, but they could not be traced beyond the departure platform at that station. There was no evidence as to when or where the parcels were lost.

The plaintiffs sued the railway company to recover 65*l.*, the value of the furs. The defendants gave notice that they relied upon s. 1 of the Carriers Act, 1830, as a defence to the action. It was not disputed by the plaintiffs that the Carriers Act applied to protect the defendants if the goods were lost during the portion of the transit by land, but they contended that the onus lay upon the defendants, if they relied upon the statute, to show that the loss occurred during that portion of the transit. The defendants, on the other hand, contended that the onus lay upon the plaintiffs to show that the loss occurred by sea.

The county court judge held that the onus lay on the defendants to show that the loss occurred during the portion of the transit by land, and that as they had failed to discharge that onus they were not entitled to the protection of the Carriers Act, 1830, and he accordingly gave judgment for the plaintiffs. The Divisional Court affirmed his judgment.

The defendants appealed.

Disturnal K.C., *Schiller K.C.*, and *Russell Davies*, for the defendants. First, even assuming that the defendants are liable if it can be shown that the furs were lost during the sea transit, the defendants are not liable in this case, inasmuch as the onus was on the plaintiffs to show, and they failed to show, that the furs were lost by sea. The plaintiffs do not establish their cause of action by merely proving the non-arrival of the furs at Belfast, for, admittedly, if they were lost during the land transit the defendants would not be liable. As regards the carriage from London to Holyhead, the defendants were not insurers; their liability as

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inafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

Sect. 2 enables common carriers to demand and receive, in respect of the packages mentioned in s. 1. an increased rate of charge, to be notified by a notice affixed in a public and conspicuous part of their office or receiving house.

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insurers could only commence when the packages were put on board ship at Holyhead, and there was no evidence that they ever were put on board. Where, as in this case, no declaration is made such as is required by s. 1 of the Carriers Act, 1830, the sender must give evidence which would exclude the carrier from the protection of the Act: *Hart* v. *Baxendale.* (1) In the Divisional Court the plaintiffs sought to distinguish that case and to put the provisions of the Carriers Act, 1830, on the same footing as an exception in a bill of lading. In support of that contention *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* (2) was cited. That case was decided on the construction of s. 502 of the Merchant Shipping Act, 1894, by which a liability is imposed upon a shipowner for loss of or damage to goods caused by fire on board his ship unless he can show that the loss happened "without his actual fault or privity." The House of Lords decided that it lay upon the shipowner to prove that the loss happened without his actual fault or privity.

[BANKES L.J. Why then was not the onus on the defendants in this case?]

The Carriers Act, 1830, is different in its terms. It says that the carrier is not an insurer if goods entrusted to him for carriage are of a certain kind and value and no declaration in respect thereof is made by the sender. The carrier is under no liability if no declaration is made. *Taylor* v. *Liverpool and Great Western Steam Co.* (3), upon which the plaintiffs also relied, turned on an exception in a bill of lading, but a person who relies upon an exception must show that he comes within it. That was a very different case from the present, where the onus is on the plaintiffs to get rid of the protection given to carriers by the Carriers Act, 1830.

[BANKES L.J. referred to Holroyd J.'s judgment in *Rex* v. *Turner.* (4)]

Secondly, the defendants are under no liability even if the furs were lost during the sea transit. The Carriers Act, 1830, provides that "no common carrier by land for hire" shall be liable in respect of certain kinds of articles unless a declaration is made; it does not limit the carrier's protection to the land transit. The statute therefore applies if a contract is made with a common carrier by

(1) (1851) 6 Ex. 769.
(2) [1915] A. C. 705.
(3) (1874) L. R. 9 Q. B. 546.
(4) (1816) 5 M. & S. 206.

land—the defendants admitted'y come within that description—notwithstanding that a portion of the transit is by sea. In *Millen* v. *Brasch & Co.* (1) the Carriers Act, 1830, was held to apply although the damage arose from delay and detention during the carriage to New York from Liverpool. If the contention that a common carrier is only protected during the land transit is sound, the defendants there would have been liable. In *Le Conteur* v. *London and South Western Ry. Co.* (2) Lush J. indicated that the carrier is protected both in respect of the carriage by land and the carriage by sea.

[PICKFORD L.J. There the loss occurred on land. All the members of the Court based their judgments upon that fact. Lush J.'s judgment must be considered in relation to the facts of the case.]

No doubt his view was not necessary for the decision, but it agrees with the contention we now put forward. Cresswell J. in the course of the argument in *Pianciani* v. *London and South Western Ry. Co.* (3) seemed to indicate the same opinion.

Langdon K.C. and *S. A. Kyffin*, for the plaintiffs, were not called upon.

PICKFORD L.J. This is an appeal from a decision of the Divisional Court affirming the judgment of the judge of the Bloomsbury County Court. The case is an important one, but I entertain no doubt that the decision of the Divisional Court is right.

The plaintiffs delivered at a receiving office of the defendants some furs of the value of 65*l.* to be carried from London to Belfast. No declaration of the value of the furs was made by the plaintiffs. The furs reached Euston Station, but, so far as the evidence shows, were not traced further. In these circumstances the plaintiffs claimed to recover the value of the furs, contending that the defendants, in not delivering the furs at Belfast, had broken their contract. In answer to that the defendants relied upon s. 1 of the Carriers Act, 1830. The plaintiffs did not dispute that if the furs were lost during the land transit the defendants were absolved from liability by virtue of that section, but they said that it was for the defendants to prove, and that they had failed to prove, that the loss occurred during the land transit. On the other hand the defendants con-

(1) (1882) 10 Q. B. D. 142. (2) (1865) L. R. 1 Q. B. 54.
(3) (1856) 18 C. B. 226, 233.

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tended that s. 1 established their non-liability as no declaration of the value of the furs had been made, and that the plaintiffs, in order to recover, must prove that the loss did not take place in circumstances which would give protection to the defendants under the section. The county court judge and the Divisional Court accepted the plaintiffs' contention, and I agree with them.

Prior to the Carriers Act, 1830, common carriers were held to be insurers and were bound to deliver goods entrusted to them for carriage at the place contracted for, except where they were prevented by the act of God or the King's enemies; but they had a habit of protecting themselves by putting up notices that they would only carry upon certain terms. There being great difficulty in proving that senders of goods had seen, or had understood, those notices, the Carriers Act, 1830, was passed, which is described as "an Act for the more effectual protection of mail contractors, stage coach proprietors, and other common carriers for hire, against the loss of or injury to parcels or packages delivered to them for conveyance or custody, the value and contents of which shall not be declared to them by the owners thereof." The preamble then recites as follows: "Whereas by reason of the frequent practice of bankers and others of sending by the public mails, ... and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors . . . . and common carriers for hire is greatly increased: And whereas through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors . . . . and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors . . . . and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses." It then proceeds to enact that common carriers by land for hire are not to be liable for the loss of or injury to certain articles, including furs, contained in any parcel delivered to be carried for hire, when the value thereof exceeds 10*l*.,

unless at the time of delivery to the carrier the value and nature of the article are declared and an increased charge, if demanded by the carrier, paid thereon. That seems to me to be a statutory exception upon the ordinary liability of a common carrier, giving him the same protection as he had under the notice mentioned in the recital when the contents had been brought to the notice of, and were understood by, the sender That being my view of the statute, the following statement by Lawrence J. as to the position of the parties in this case seems to me to be right : " The plaintiffs' cause of action is for breach of contract by the non-delivery of the goods that the defendants contracted to deliver, and in order to escape liability the defendants must plead a good plea—one that will cover the whole cause of action. This was a contract for the carriage of goods partly by land and partly by sea, and the defendant company set up a plea which would be an answer to the plaintiffs' claim only in respect of a loss during the carriage by land ; but the defendants did not prove that the goods were lost during that portion of the transit, and consequently their plea is bad," or, as I should prefer to say, " consequently their plea is not proved." These defendants are carriers by land, and they are also carriers by sea. They put the whole transaction in one contract. *Le Conteur* v. *London and South Western Ry. Co.* (1) decided that such a contract is divisible and may be looked at as being a contract by a land carrier for so much of the transit as is by land, and by a carrier by sea for so much of the transit as is by sea. The defendants therefore, in order to escape liability, have to prove that the goods were lost under circumstances coming within the exception—I call it an exception—to their liability stated in the section. It has also been contended that as they are carriers by land it does not matter where the goods were lost, whether during the land or during the sea transit. It is not quite clear whether that point was taken in the county court, although apparently it was argued in the Divisional Court. If it was not taken in the county court the point is not open in this Court, but it is unnecessary to consider whether it was taken in the county court, because in my opinion it is not sound. The authority which it is suggested supports the contention is the judgment of Lush J. in *Le Conteur* v. *London and South Western Ry. Co.* (1) In my opinion that affords

(1) L. R. 1 Q. B. 54.

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no foundation for the argument. Lush J. had, in my opinion, no intention of deciding more than the other members of the Court, namely, that in a contract of this kind where the transit is partly by land and partly by sea, the capacities and liabilities of the carrier are divisible, and that during the carriage by land he is entitled to the protection given by the statute to a carrier by land whereas during the carriage by sea he is not entitled to that protection. That was all that the Court decided in that case. The defendants in this case have not proved that the furs were lost while in their possession during the land transit; consequently they did not prove their plea, and therefore they are liable as common carriers for the loss. The appeal must be dismissed.

BANKES L.J. I agree. The last point taken on behalf of the defendants was that the Carriers Act, 1830, applies to carriage by sea in the same way as it applies to carriage by land. As to that, it is sufficient to say that no authority for that proposition has been cited to us, and certainly the language of the Act affords no justification for the contention. We have to deal with a case where the contract was for carriage partly by land and partly by sea. Such a contract is divisible, as was decided in *Le Conteur* v. *London and South Western Ry. Co.* (1) That case and *Pianciani* v. *London and South Western Ry. Co.* (2) also decided that where under such a contract proof is given that the loss of the goods has occurred during the land transit the statute protects the carrier. The point now argued is whether it lies upon the plaintiffs to give evidence which would exclude the defendants from the benefit of the Act, or whether it lies upon the defendants to give evidence that they are entitled to its protection. In my opinion the defendants' contention that the onus is upon the plaintiffs is contrary to the general rule and its accepted application. I can see no difference between this case and the case of an exception contained in a bill of lading. For this purpose the Carriers Act, 1830, is a mere exception from the general law, and the general rule applies to it just as much as it applies to a bill of lading. The general rule is well stated by Holroyd J. in *Rex* v. *Turner* (3), where he said: "It is a general rule, that the

(1) L. R. 1 Q. B. 54. (2) 18 C. B. 226.
(3) 5 M. & S. 206, 213.

affirmative is to be proved, and not the negative, of any fact which is stated, unless under peculiar circumstances, where the general rule does not apply." The Carriers Act, 1830, being, as I have said, like an exception in a bill of lading, I am unable to draw any distinction as regards this point between the present case and *Asiatic Petroleum Co.* v. *Lennard's Carrying Co.* (1), which turned on the construction of s. 502 of the Merchant Shipping Act, 1894, which is in these terms: "The owner of a British sea-going ship, ... shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:—(1.) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship. . . . ." The question was upon whom the onus rested of proving the absence of actual fault or privity. Hamilton L.J. said (2): "Can it be said that the cargo was burnt without the actual fault or privity of the owners? Though I think that the whole onus lies on the shipowner of proving as a defence loss by a fire, of which he can predicate that it happened without his actual fault, and that 'without his actual fault or privity' in s. 502 of the Merchant Shipping Act, 1894, differs in this respect from negligence in connection with excepted perils in a bill of lading (*The Glendarroch* (3)), I need not decide it, for the facts proved are quite sufficient for the purpose, let the onus lie where it may." That view was expressly approved by Lord Dunedin in the House of Lords. (4) It is said, on the other hand, that *Hart* v. *Baxendale* (5) supports the defendants' contention. I do not agree. The facts of that case, which must be looked at in order to appreciate certain statements in the judgments, were these: the defendant, a carrier, collected by a collecting van a parcel from the plaintiff's place of business; the parcel contained goods exceeding 10*l.* in value, and the plaintiff made no declaration as to the value. It was contended for the plaintiff that a carrier was not within the protection of the Act unless the parcel was delivered at his office where the notice mentioned in s. 2 was affixed, and in that case the

(1) [1914] 1 K. B. 419; affirmed sub nom. *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* [1915] A. C. 705.

(2) [1914] 1 K. B. 436.

(3) [1894] P. 226.

(4) [1915] A. C. 715.

(5) 6 Ex. 769.

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parcel was delivered to the carrier at the plaintiff's own place of business; but the Exchequer Chamber held that the defendant was entitled to the benefit of the Act although the parcel was not received by him in the office where the notice was exhibited. That decision is no authority for the proposition that it lies upon the plaintiff in every case to give evidence excluding the carrier from the benefit of the Act.

SCRUTTON L.J. On principle and on authority I think the decision appealed from was right. Before the Carriers Act, 1830, and since the Act in the case of those to whom it does not apply, a carrier, if he failed to deliver goods entrusted to him for carriage, was liable unless he proved that the loss was due to the act of God or the King's enemies. If he proved something which prima facie raised a case of exception, he so far had done his duty, and the burden was shifted to the plaintiff. If the carrier proved something which was equally consistent with liability and non-liability, he failed to displace the plaintiff's case. These principles are well illustrated by two cases, one on one side of the line and the other on the other side. In *Taylor* v. *Liverpool and Great Western Steam Co.* (1) a bill of lading contained an exception of thieves. The Court held that that only applied to thieves external to the ship. It was proved that the goods were stolen, but there was no proof by whom. The Court said, there being proof of a theft, without proof of who the thief was, that the shipowners had not made out a prima facie case freeing themselves from liability, and consequently the plaintiffs succeeded. The case on the other side of the line is *The Glendarroch.* (2) There the plaintiffs brought an action for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence. The plaintiffs proved the non-delivery of the goods, and the shipowners proved a prima facie case of loss by perils of the sea. Sir F. Jeune P. held that the shipowners failed because they had not proved that the loss was due to a peril of the sea not caused by the negligence of those on board. This was held to be wrong by the Court of Appeal, because, as was said, on a prima facie case of lost by a peril of the sea being shown the burden of proof shifted, and if the plaintiffs wished to displace that they must prove negligence.

(1) L. R. 9 Q. B. 546. (2) [1894] P. 226.

That being the law, the Carriers Act, 1830, says that in the case of specified articles exceeding a certain value the carrier shall not be liable unless the sender makes a declaration of their nature and value and pays the extra charge demanded. Following upon the principles I have stated, it appears clear that where a plaintiff proves delivery of goods to carriers for carriage, and also the non-arrival of the goods at their destination, it is for the carriers to prove that they are entitled to the protection of the Act. They must prove that they are land carriers, that the goods are within the section and of greater value than 10*l.*, and that no declaration was made regarding them or an extra charge paid. In *Hart* v. *Baxendale* (1) it was the defendant, the carrier, who pleaded the statute in answer to the plaintiff's claim. In this case the defendants plead the statute, but the plaintiffs reply, "You prove what is equally consistent with liability and non-liability because you carry by land and sea; if the loss occurred by land the statute protects you, if it occurred by sea it does not, and as you have given no evidence to show whether the loss occurred on land or on sea you have not shown a prima facie case for exemption from liability." In these circumstances I agree that the defendants' plea fails and that the appeal must be dismissed.

I only wish to cite, without doing more, the admirable judgment of Palles C.B in *Curran* v. *Midland Great Western Ry. Co.* (2), where, notwithstanding a special contract exempting the carriers from all liability, they were held liable for the non-delivery of certain pigs, as they had given no evidence as to why or how the pigs were not delivered.

Appeal dismissed.

Solicitors for plaintiffs: *Ballantyne, Clifford & Hett.*
Solicitor for defendants: *M. C. Tait.*

(1) 6 Ex. 769. (2) [1896] 2 I. R. 183.

J. S. H.

C. A.
1918
July 8, 9.

[IN THE COURT OF APPEAL.]

LEOPOLD WALFORD (LONDON), LIMITED *v.* LES AFFRETEURS REUNIS SOCIETE ANONYME.

[1917 L. 1393.]

Ship—Charterparty—Chartering Broker's Commission—Custom.

A clause in a time charterparty provided that "a commission of three per cent. on the estimated gross amount of hire is due to Leopold Walford (London), Limited, on signing this charter (ship lost or not lost)." No hire was in fact earned under the charterparty:—

Held, (1.), that the charterers, as trustees for the brokers, could enforce the clause against the shipowners; and (2.) that a custom by which commission was payable only if hire was earned under the charterparty could not be set up by the shipowners as an answer to the brokers' claim, inasmuch as it was inconsistent with the terms of the clause.

Robertson v. *Wait* (1853) 8 Ex. 299 approved and followed.

Harley & Co. v. *Nagata* (1917) 23 Com. Cas. 121 distinguished.

Decision of Bailhache J. reversed.

APPEAL from a decision of Bailhache J.

The plaintiffs claimed commission for effecting a time charterparty, dated September 28, 1916, between the defendants, as owners of the steamship *Flore*, and the Lubricating and Fuel Oils Company, Limited, as charterers, clause 29 of which being in these terms: "A commission of three per cent. on the estimated gross amount of hire is due to Leopold Walford (London), Limited, on signing this charter (ship lost or not lost)." The charterparty was an extension of a previous one dated December 9, 1915, in which the rate of commission was five per cent. and was payable to H. E. Moss & Co., the brokers acting for the owners, who by arrangement were to share it with the plaintiffs. The new charterparty was drawn up in accordance with an agreement signed at Paris, which, besides containing various provisions not material for the purposes of this report, had the following clause: "The brokers will continue their good services to either party but their total brokerage fixed for the charterparty at five per cent. will be reduced for the extension period to three per cent. For all other conditions of detail the brokers of the respective parties will have to fix together the final clauses."

In accordance with this agreement the rate of commission in the printed form of charterparty sued on was altered from five to three per cent.

The defendants said, inter alia, that as the *Flore* was requisitioned by the French Government before any hire was earned under the charterparty in question no commission was payable, and they relied upon, and gave evidence to establish, a custom of the trade that chartering brokers' commission is payable only in respect of hire duly earned under the charterparty.

It was agreed that the action should be treated as if brought by the charterers as trustees for the plaintiffs.

Bailhache J. gave judgment for the defendants. In the course of his judgment he said: "If the charterer were suing in his own right in respect of clause 29, of course there would be no answer to the claim, but suing on behalf of the broker, I think, although he may sue directly upon the contract, he cannot recover in that action more than is in fact due from the shipowner to the broker. That brings us back to the question, what, if anything, is due from the shipowner to the broker? Now, a custom was proved before me in another case of *Harley & Co.* v. *Nagata* (1) to this effect, that it is the invariable practice in time charterparties that brokers' commission is payable out of hire that is earned; the charterer sends the hire money to the broker, the broker deducts his commission from the hire, and sends the balance to the shipowner. That is the way in which it is paid; and further, that it is the invariable practice that, unless hire is earned, no commission is payable at all; and that that practice is entirely irrespective of the form in which the commission clause finds its way into the charterparty; that the form of the commission clause has no effect at all upon the contract between the broker and the shipowner for the payment of hire. That custom was proved by very satisfactory evidence in the case to which I have referred, which has also been proved in this case again . . . . The custom must prevail."

The plaintiffs appealed.

MacKinnon K.C. and *Raeburn* for the plaintiffs. The action being treated as brought by the charterers as trustees for the

(1) 23 Com. Cas. 121.

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brokers, the plaintiffs are entitled to succeed on the terms of clause 29 : *Robertson* v. *Wait.* (1) The custom relied upon by the defendants by which commission is payable only if hire is earned under the charterparty cannot override the specific agreement of the parties. Applying the test suggested in *Humfrey* v. *Dale* (2), of writing out the custom alongside clause 29, it is clearly seen that the two are irreconcilable. The case of *Harley & Co.* v. *Nagata* (3) is distinguishable, for in that case the plaintiffs, the brokers, were not suing through the charterers as trustees for them, and as Bailhache J. held that they had failed to establish a special bargain for their remuneration the custom must prevail. [*White* v. *Turnbull, Martin & Co.* (4) was also referred to.]

R. A. Wright K.C. and *A. Neilson* for the defendants. The judgment of Bailhache J. was right. First, the custom set up by the defendants was found as a fact by the judge. Secondly, no special agreement between the brokers and the shipowners was proved. In those circumstances, brokerage services being rendered in the ordinary way on the London market, there is nothing to exclude the custom. The argument for the plaintiffs treats clause 29 of the charterparty as a contract between the brokers and shipowners. If it were, we could not resist the claim unless we obtained rectification ; but clause 29 is not a contract between those parties, and the plaintiffs cannot therefore rely upon it. In Carver on Carriage by Sea, 6th ed., s. 122, the author, referring to this question, only says, in citing *Robertson* v. *Wait* (1), that "probably the charterer might enforce the clause against the shipowner, as trustee for the broker."

[PICKFORD L.J. I observe that, but I also see that in Scrutton on Charterparties and Bills of Lading, 8th ed., p. 40, it is stated quite definitely that "the charterer could sue upon the charter as trustee for the broker : *Robertson* v. *Wait.*" (1)]

Raeburn replied.

PICKFORD L.J. I think this appeal must succeed. Possibly Bailhache J.'s judgment may be more in accordance with business practice in the City than the one I am about to deliver ; but if

(1) 8 Ex. 299.
(2) (1857) 7 E. & B. 266, 275.
(3) 23 Com. Cas. 121.
(4) (1898) 3 Com. Cas. 183.

parties put their names to a document without considering whether it does or does not conflict with their business practice they must expect to meet difficulties when questions arise.

The action is, in effect, brought by the charterers as trustees for the brokers upon a clause in the charterparty providing for payment of commission to the brokers who effected the charter. The payment of commission is regulated by that clause, and by that alone. Not being parties to the charterparty, the brokers could not sue upon the clause in their own name, but by arrangement the action proceeded as though the charterers were the plaintiffs, and the question for determination is, was there a contract between the charterers and the shipowners by which the latter undertook to the former to pay a certain sum as commission to the brokers? If there was, I think it was settled in *Robertson* v. *Wait* (1) that the charterers can sue upon it as trustees for the brokers. *Robertson* v. *Wait* (1) has never been disapproved. It was cited with approval, although distinguished, by the Divisional Court in *West* v. *Houghton* (2), and it was also approved by Sir Robert Phillimore in *The Nuova Raffaelina.* (3) The principle established in that case appears to me to be right. It is, if A. agrees with B. that he will pay a certain sum of money to B. for the benefit of C., B., as trustee for C., can sue A. Clause 29 of the charterparty, upon which the claim is based, is in these terms: "A commission of three per cent. on the estimated gross amount of hire is due to Leopold Walford (London), Limited, on signing this charter (ship lost or not lost)." That on the face of it is as clear as can be. As, however, the ship was requisitioned and no hire was in fact earned under the charterparty, the defendants, in answer to the claim, pleaded, inter alia, a custom of the trade that chartering brokers' commission is payable only in respect of hire duly earned under the charterparty, and the judge found that the defendants had proved that custom. I rather think he found a more extensive custom. I take his finding of fact as correct, although whether I should have found such a custom myself upon the evidence that was given I need not consider, but I observe that the case proceeded upon the basis of the judge importing a quantity of evidence heard by him in *Harley & Co.* v. *Nagata* (4)

(1) 8 Ex. 299.
(2) (1879) 4 C. P. D. 197.
(3) (1871) L. R. 3 A. & E. 483.
(4) 23 Com. Cas. 121.

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to establish this custom, and in that case he held it to be established. But the very serious question arises, can such a custom exist? There is no special sanctity about a custom in the shipbroking business; the custom must conform to the ordinary conditions applicable to mercantile customs in other trades, and one of these is that it must not be inconsistent with any special agreement between the parties. I do not think it admits of argument that the custom relied upon in this case is absolutely inconsistent with the commission clause in the charterparty, because if written out it would read thus: "A commission of three per cent. on the estimated gross amount of hire is due to Leopold Walford (London), Limited, on signing this charter (ship lost or not lost), but such commission shall only be payable out of hire as it accrues, and if no hire accrues it shall not be payable at all." If clause 29 is the contract applicable, clearly the custom cannot prevail. Then does clause 29 constitute the contract? I cannot see why it does not. The charterparty was sent by the chartering brokers to the shipowners or to their brokers, by whom it was read and considered, and indeed an alteration was made in this very clause by substituting three per cent. for five per cent. as the rate of commission. So altered, the charterparty was signed and returned by the shipowners to the charterers as the contract under which the ship was hired. Mercantile men cannot put their names to a document and then say they never meant to be bound by one of its clauses. Therefore I think it is quite clear that this is a contract between the charterers and the shipowners as to the commission that is to be paid to the chartering brokers.

It was said, however, that the charterers cannot sue on this as trustees for the brokers because either by custom or by some agreement of their own with the shipowners the brokers are precluded from claiming. If an agreement between the brokers and the shipowners whereby the brokers agreed to take something less than that which is mentioned in the charterparty were proved, the defendants would be entitled to say that the brokers could not by suing through trustees get more. But no such agreement was proved. The Paris agreement was referred to, but that agreement, which provided for an extension of a previous charterparty, contained this clause: "The brokers will continue their good services to either party but

their total brokerage fixed for the charterparty at five per cent. will be reduced for the extension period to three per cent. For all other conditions of detail the brokers of the respective parties will have to fix together the final clauses." As I understand, the brokers met and agreed the clauses as in the charterparty of September 28, 1916, and that demonstrates again that clause 29 was intended to be, and was, the only agreement with regard to the brokers' remuneration. Another, and still more remarkable, contention was advanced by the defendants and was accepted by the judge, namely, that the custom is not only one by which, in the absence of express agreement to the contrary, brokerage is payable only out of hire earned, but it is a custom which disregards any special agreement whether signed by the parties or not. I doubt if such a custom was proved. Assuming, however, that it was proved, it is absolutely bad. A custom only binds parties in the absence of special agreement inconsistent with it. I have never heard of a custom that, notwithstanding any special agreement parties may make, it must be disregarded if it conflicts with the custom. But a custom excluding the power of parties to contract out of the custom is what the judge has found here. Such a custom cannot exist in law. I think, therefore, that the charterers, suing as trustees for the brokers, are entitled to recover commission under clause 29 of the charterparty.

I desire to add this: there are forms of charterparties in which the commission clause is in accordance with the custom pleaded, namely, that it is paid only out of hire earned, and the cause of all this difficulty is that the shipowners did not take the trouble to see that the charterparty signed by them was in a different form. It is, as I have already indicated, an impossible position for them to take up when they say, in effect, that no matter in what form the charterparty is expressed, they will disregard it. Bailhache J. followed to a certain extent another case decided by him, *Harley & Co.* v. *Nagata* (1), but that does not seem to rest on the same basis as this. There the charterer was not a party to the action, which was brought by the broker alone. The judge could not, therefore, in that case deal with the clause in the charterparty because the broker was not a party to that contract. He dealt with it upon the footing that there was no special agreement between the broker and the ship-

(1) 23 Com. Cas. 121.

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owner. In such a case the custom as to commission being payable only out of hire probably would apply. This is a different case, because the action is brought by the charterers as trustees for the brokers, and for the reasons I have given it ought to have succeeded. The appeal will be allowed.

BANKES L.J. I agree. The action is brought by chartering brokers to recover commission which they alleged was due to them under a charterparty, dated September 28, 1916, which they negotiated. The plaintiffs were not parties to the contract alleged to be contained in the charterparty, but it was arranged, in order to avoid any amendment, and in order to bring the plaintiffs within the decision of *Robertson* v. *Wait* (1), that the action should be treated as brought by the charterers for the benefit of the plaintiffs. That that is possible, and that the contract inserted in the charterparty between the charterers and the shipowners can be treated as a contract made by the charterers in the interests of the brokers and on which they, the charterers, can sue as trustees for the brokers, must be taken to be established law since the decision in *Robertson* v. *Wait* (1), a decision which has never been questioned.

In the earlier part of his judgment Bailhache J., after setting out the language of clause 29, said: "If that clause represents the contract between the shipowners and the brokers there is no possible answer to the claim." He held, however, that that was not the contract between them, and he found upon evidence given at the trial, and upon evidence which he had before him in *Harley & Co.* v. *Nagata* (2), that there is a custom as set up by the defendants that commission under time charters is payable only upon hire earned. I will assume that the judge was right in finding upon the evidence that such a custom existed and that it could apply without infringing any of the well-established rules of law as to the application of customs to contracts. As established, the custom is said to extend a step beyond what it would appear to mean by its precise terms because it was said by one of the witnesses—the only one called upon this point in the action—that the custom applies whatever may be the terms of the written contract contained in the charterparty. In my opinion any such custom as that is unreasonable and

(1) 8 Ex. 299. (2) 23 Com. Cas. 121.

therefore cannot be upheld. I do not think that Bailhache J. has really accepted the custom in that sense. Having regard to the existence of the custom, he came to the conclusion that in this case and in *Harley & Co.* v. *Nagata* (1) there was a contract between the shipowners and the brokers entirely outside, and independently of, the contract between the shipowners and the charterers contained in the charterparty. If there was evidence of that, the judge would be justified in arriving at the conclusion he did. He has apparently assumed the existence of such a contract, but I can find no evidence of any except that contained in the charterparty. The two persons who negotiated the charterparty were called—Mr. Moller as representing the plaintiffs and Mr. Stoeger as representing H. E. Moss & Co., the shipowners' brokers; and neither of them suggests that there was any contract between the shipowners and the brokers which would admit of the custom being embodied in it. The evidence of Mr. Moller when he spoke of the arrangement as to brokerage was this :—" Q. Then there was, in regard to the second charterparty, apparently some arrangement by which [the brokerage] was reduced from five per cent. to three ?—A. Exactly ; that is so. Q. Who was that discussed with ?—A. That emanated from the owners of the steamer and was agreed in consultation with H. E. Moss & Co., in the eventual conclusion of the charter. Q. The owners suggested it, and you agreed to it ?—A. Yes." In Mr. Stoeger's evidence I find this in cross-examination :—" Q. In the second charterparty the brokerage was reduced from five to three ?—A. Yes. Q. That was arranged, I think, through you with Messrs. Walford ?—A. Quite so. . . . . Q. The shipowners said they would not pay the five per cent. ?—A. Yes. . . . . Q. Otherwise the terms about brokerage remained the same ?—A. Yes. We expected to go on collecting it in the same manner as we had been (2) on the previous charter, the original charter." In his re-examination I find this :—" Q. You do not consider the claim in accordance with the brokerage agreement ?—A. I do not think it is a just claim. Q. Whatever words appear in the printed charterparty ?—A. I take it they were only a printed form which was passed by the owners when they signed it." In addition to that evidence it is to be observed that five per cent., which was the rate of commission

(1) 23 Com. Cas. 121. (2) *Sic.*

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mentioned in the previous charterparty, and which was in print in this charterparty, was struck out and three per cent. substituted. In those circumstances it seems to me impossible to find any contract binding the shipowners to pay commission except the contract contained in clause 29. That being so, the appeal succeeds.

SCRUTTON L.J. I have come to the same conclusion, but as it would seem that our judgment will come as a surprise and a shock to a number of eminent business men, and as I am quite certain that unless these business men pay attention to what we say they will have further surprises and shocks, I desire to state my reasons for the decision at which I arrive.

Brokers claim commission from shipowners, and they claim it because the shipowners signed the charterparty dated September 28, 1916, containing clause 29, a clause in which the rate of commission, namely three per cent., is written in instead of five per cent., which was in print. To the action so framed there would be one complete answer, namely, that Leopold Walford (London), Limited, were not parties to the charterparty and therefore could not sue upon it. That objection, which has existed so long as I have been at the Bar, has always been avoided, on the authority of *Robertson* v. *Wait* (1), by the charterers suing as trustees for the brokers, or by the shipowners not taking the objection that the brokers were not parties to the charterparty. In this action it was agreed that it should be treated as though the charterers were suing. *Robertson* v. *Wait* (1) has never, so far as I know, been questioned. It was a decision of a Court which included Parke and Martin BB., acted upon without question throughout my experience at the Bar, and I can see no reason for doubting its correctness. That difficulty being surmounted, the real defence set up by the shipowners appears, namely, that a custom exists in chartering business by which chartering brokers' commission is payable only in respect of hire duly earned under the charterparty, and that, as no hire was in fact earned under this charterparty, no commission is payable. The first answer to that is this, that evidence of a custom is not admissible if it contradicts the terms of the written contract between the parties. The custom set up is directly contrary to clause 29, which provides that

(1) 8 Ex. 299.

"a commission of three per cent. on the estimated gross amount of hire is due to Leopold Walford (London), Limited, on signing this charter (ship lost or not lost)." To meet that objection a more extended custom was set up, and I think has been found by the judge, because he says: "It is the invariable practice that, unless hire is earned, no commission is payable at all; and that that practice is entirely irrespective of the form in which the commission clause finds its way into the charterparty; that the form of the commission clause has no effect at all upon the contract between the broker and the shipowner for the payment of hire." That amounts to this, that while under ordinary circumstances a custom may be excluded by the agreement between the parties, an agreement as to brokers' commission, if it is expressed in the form of a charterparty, cannot exclude this custom. I will assume that such a custom was proved. It is not one of which the Court can take judicial notice without proof, and in this case the evidence given in support of it was extremely slight. Bailhache J. found the custom because in the previous case of *Harley & Co.* v. *Nagata* (1) he had a mass of evidence which satisfied him that the custom existed. A custom must be reasonable, and it appears to me that it is absolutely unreasonable to say that parties who sign their names to a document containing the terms of the contract between them should be permitted to say that a clause in that document, the terms of which they have actually amended, does not form part of the contract because there is a custom by which it can be disregarded. Such a custom is unreasonable. If the custom exists as pleaded it can be excluded by agreement between the parties. The plaintiffs were not parties to the charterparty, and the shipowners and the charterers made an agreement as to the commission which the plaintiffs should receive. Such a contract is obviously one which excludes the custom if such a custom exists. If there was an agreement between the shipowners and the plaintiffs contrary to the terms contained in clause 29, the shipowners would no doubt have a good defence, but I can find no trace of any such agreement. There were two charterparties; in the first the parties took a printed clause and altered it in one respect. The name of Leopold Walford (London), Limited, was struck out and the name of H. E. Moss & Co. substituted.

(1) 23 Com. Cas. 121.

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H. E. Moss & Co. and the present plaintiffs then made an agreement between themselves by which the plaintiffs should obtain a share of the commission received by H. E. Moss & Co., the same to be deducted from the hire paid. That agreement has, however, no bearing upon this case, for the parties signed a fresh agreement that the brokers should continue to give their good services, that their commission was to be reduced from five per cent. to three per cent., and that for all other conditions of detail the brokers of the respective parties were to fix the final clauses. The second charterparty was then drawn up, and it differed from the first in retaining the plaintiffs' name in the commission clause and in making the commission of three per cent. (instead of five per cent.) payable on the estimated gross amount of hire, ship lost or not lost. There is no trace of any outside agreement. That being so, we are face to face with a clause in an agreement signed by the shipowners—a clause altered by them, and which they do not attempt to have rectified—upon which the charterers can sue as trustees for the brokers. It would be absolutely fatal to all commercial business in the city of London if parties who have signed documents can afterwards say that by virtue of a custom that which they have signed is not binding upon them. If this decision upsets the practice in the city of London, let business men read the contracts they sign and alter the form of the commission clause if they want it to conform to the custom. So long as they sign documents they must expect the Courts to pay more attention to what they have signed than to a custom which conflicts with their written contract. For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for plaintiffs : *Lawrence Jones & Co.*
Solicitors for defendants : *Thomas Cooper & Co.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1918
April 29.

HARPER *v.* FIRBANK AND OTHERS.

[1915 H. 1774.]

Costs—Taxation—Interim Certificate—Disallowance of Items without Objection—Interim Certificate for Lump Sum on Account—Subsequent Objection to Disallowance—Validity of Objection—Power of Taxing Master to alter his original Decision—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *regs.* 17 (*b*), 39.

The certificate or allocatur referred to in the earlier part of Order LXV., r. 27, reg. 39, before the signing of which a party may and after the signing of which he may not carry in an objection to the allowance or disallowance by the taxing officer of any items in the bill of costs, is either a final certificate, or else an interim certificate specifically certifying the allowance or disallowance of these particular items.

Consequently, the signing of an interim certificate which merely gives a round sum on account of the items in the bill of costs which are not at that time the subject of objection does not prevent a party from carrying in, or the taxing Master from considering, a subsequent objection in respect of items that had been allowed or disallowed without objection before the signing of that certificate.

APPEAL from an order of Lord Coleridge J. at chambers.

In 1884 Joseph Firbank, a contractor, recovered judgment for a certain sum in an action brought by him against the directors of the Charnwood Forest Railway Company for breach by them of an implied warranty of authority to issue valid debenture stock of the company, they having issued to him in part payment of work done by him for the company what purported to be valid debenture stock of the company of a certain amount, but was not such in reality by reason of the fact, which was unknown to the directors, that it was issued ultra vires (1); and that sum was paid to the contractor by four of the directors in equal shares.

In 1915 the plaintiff, who was the executrix of C. Stretton, one of these directors, brought the present action against the defendants, who were the executors of the contractor, and the railway company, claiming as against both the defendant executors and the defendant company a declaration that C. Stretton, on payment of his

(1) See *Firbank's Executors* v. *Humphreys* (1886) 18 Q. B. D. 54.

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one fourth share of the sum paid by the directors as aforesaid, became entitled to have assigned to him one fourth share of the rights of the contractor under his contract against the defendant company so far as such rights were satisfied by payment of that sum, or arose out of the issue of the invalid debenture stock; a declaration that the plaintiff was entitled as against the defendants to so much of the debenture stock of the defendant company as had been issued in respect of the said contract as corresponded to the fourth share paid by C. Stretton of the said sum; a declaration that the defendants held all such debenture stock as trustees for the plaintiff; and an order that one fourth share of all such debenture stock should be transferred to the plaintiff; and as against the defendant company a declaration that as from the date of payment by C. Stretton of his fourth share in the said sum, he and the plaintiff as his executrix were entitled to receive a corresponding amount of valid debenture stock of the company; a declaration that C. Stretton became entitled to an indemnity and repayment; and an order commanding the defendant company to enter on their register the name of the plaintiff in lieu of the names of the defendant executors.

At the trial of the action before Shearman J. the respective defendants were separately represented by leading and junior counsel.

On May 10, 1917, Shearman J. held that the plaintiff's claim was barred by the Statute of Limitations and gave judgment for the defendants with costs to be taxed.

On June 14, 1917, the defendants delivered their bill of costs amounting to 797*l.* 3*s.* 7*d.*, which included as separate items the attendances upon and fees of the respective counsel of both the defendant executors and the defendant company.

On June 28 and July 9, 1917, the taxation took place, the result being that the taxing Master disallowed certain items, including the attendances upon and fees of the counsel for the defendant company, on the ground that the interests of the respective defendants were so similar that it was unnecessary that they should be represented by separate counsel.

On July 18, 1917, the plaintiff lodged objections to certain items in the bill, including the attendances upon and fees of the counsel

for the defendant company and some other small items, amounting in all to 135*l.* 13*s.* 4*d.*, and on the same day the defendants requested the taxing Master to issue his certificate.

On July 21, 1917, the taxing Master signed an interim certificate as follows: "Objections to my taxation have been lodged by the plaintiff, and pending my consideration thereof I certify that the defendants are entitled to the sum of 280*l.* on account of the items in the defendants' said costs which are not the subject of objections, and I make this my interim certificate at the request of the defendants."

On November 19, 1917, the Court of Appeal dismissed the appeal of the plaintiff from the judgment of Shearman J., and, at the request of counsel for the defendant company for guidance in the matter, expressed the view, though without giving any ruling or direction, that, as regarded the proceedings in the Court of Appeal, the cases of the respective defendants were so distinct that they were entitled to be represented by separate counsel and to separate costs in respect thereof.

On December 5, 1917, the defendants lodged objections to the taxation, namely, that it disallowed the attendances upon and fees of the separate counsel of the defendant company.

On December 11, 1917, the taxation of the costs of the appeal took place, and the taxing Master then intimated that he would have to alter his former opinion as to the costs of separate representation at the trial; and in view of that intimation the defendants shortly afterwards withdrew their objections.

On February 4, 1918, the plaintiff, having regard to that intimation of the taxing Master, lodged counter-objections to the taxation objecting to any reinstatement of the items referred to in the defendants' objections.

On February 22, 1918, the taxing Master, in his answers to these counter-objections, stated that, the Court of Appeal having been of opinion that separate representation was justified on the appeal and having, as he considered, directed him to allow the costs of it, it was a fortiori justifiable on the trial of the action, and that he was bound to apply their decision and had reconsidered and reviewed his taxation. He accordingly allowed the items relating to the separate counsel of the defendant company.

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As ultimately allowed by the taxing Master the total amount of the defendants' bill of costs of the trial, including the amount for which the interim certificate had been given, was 550*l.* 11*s.* 9*d.*

On March 19, 1918, the taxing Master gave his final certificate in respect of these costs.

On April 12, 1918, Lord Coleridge J., on a summons by the plaintiff that the taxation might be reviewed, the plaintiff's objections allowed, and the items specified therein disallowed, made an order remitting the matter to the taxing Master with a direction to restore his original decision.

The defendants appealed.

J. A. Hawke K.C. and *F. Shewell Cooper* for the defendants. The order of Lord Coleridge J. remitting the matter to the taxing Master and directing him to restore his original decision disallowing the defendants the items in the bill of costs relating to the costs of the separate counsel of the second defendants was wrong and should be set aside. The later decision of the taxing Master allowing the defendants these items should be allowed to stand.

The defendants did not carry in their objections to the disallowance of these items by the taxing Master too late to admit of his reviewing the taxation in respect of these items. The objections were not carried in later than they should have been under Order LXV., r. 27, reg. 39. (1) That regulation provides that any

(1) Rules of the Supreme Court, 1883, Order LXV., r. 27: "(17.) . . . . (*b*) The taxing officers of the Supreme Court or of any division thereof shall have power and authority to make one or more interim certificate or certificates, allocatur or allocaturs, in any taxation for any portion or portions of the taxed costs directed to be taxed without waiting until a certificate for the full amount can be made."

"(39.) Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by him, of the whole or any part of any items, may, at any time before the certificate or allocatur is signed, or such earlier time as may in any case be fixed by the taxing Master, deliver to the other party interested therein, and carry in before the taxing officer, an objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items or parts thereof objected to, and the grounds and reasons for such objections, and may thereupon apply to the taxing officer to review the taxation in respect of the same. The taxing

party who may be dissatisfied with the allowance or disallowance by the taxing Master of any items may at any time before the certificate is signed carry in an objection to such allowance or disallowance and apply to the taxing Master to review the taxation in respect of the same; and that the taxing Master may issue pending the consideration of such objections a certificate for or on account of the remainder of the bill of costs, and such further certificate as may be necessary. On the true construction of that regulation the certificate referred to in the earlier part of it which precludes a party from carrying in a subsequent objection to the allowance or disallowance of any items is either a final certificate allowing or disallowing all the remaining items in the bill as to which no objection had been taken when the certificate was signed, or an interim certificate allowing or disallowing particular items including those to which the subsequent objection is taken. The certificate here in question was neither a final certificate, nor an interim certificate dealing with particular items including those to the disallowance of which the defendants' objections related. It was merely an interim certificate giving a round sum on account of the remaining items in the bill which were not the subject of objections, that sum being much less than the sum at which these remaining items were eventually allowed by the taxing Master. It was not, therefore, such a certificate as prevented a subsequent objection to the items in question from being carried in by the defendants and considered by the taxing Master.

Secondly, as to the merits, the taxing Master was right, more especially in view of the opinion which had been expressed by the Court of Appeal when the case was formerly before it, in altering his original decision disallowing the defendants the items in respect of the costs of the separate counsel of the second defendants, and in allowing the defendants these items.

G. Edwardes Jones for the plaintiff. The order of Lord Coleridge J. remitting the matter to the taxing Master and directing him to restore his original decision was right and should be affirmed.

Master may, if he shall think fit, issue pending the consideration of such objections, a certificate of taxation or allocatur for or on account of the remainder of the bill of costs, and such further certificate or allocatur as may be necessary shall be issued by the taxing Master after his decision upon such objections."

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The defendants carried in their objections to the disallowance of the items in question too late to enable them to obtain, or the taxing Master to grant, a review of the taxation as to these items consistently with Order LXV., r. 27, regs. 17 (*b*) and 39. It had been held in *Silkstone and Haigh Moor Coal Co.* v. *Edey* (1) that the taxing Master could make only one final certificate for the whole of the taxed costs, and as the result of that case reg. 17 (*b*) was made, which expressly authorizes the taxing Master to make an interim certificate for any portion of the taxed costs. The taxing Master can accordingly now make an interim certificate as well as a final certificate. Reg. 39, by its earlier part, provides that a party dissatisfied with the allowance or disallowance by the taxing Master of any items is to carry in his objections before the certificate is signed, and since the term "certificate" may apply to an interim as well as to a final certificate, the party must carry in his objections, not only before the signing of the final certificate, but before the signing of an interim certificate; and under that part of the regulation it is essential that the party should carry in his objections as there required to these items in order that he may apply for a review of the taxation as to these items: see *Strousberg* v. *Sanders* (2), and per Lord Esher M.R. in *Shrapnel* v. *Laing*. (3) From the latter part of that regulation it appears that the interim certificate may be made either "for" or "on account of" the remainder of the bill of costs which is not the subject of the objections, but in whichever of these forms it be made it necessarily relates to all the items in the bill as to which objections have not been duly taken. It therefore follows from both parts of the regulation taken together that after an interim certificate has been signed in respect of the items which are not then the subject of objections, no subsequent objection can be carried in as to any of these items. In the present case the taxing Master on taxation disallowed the items in the bill relating to the costs of the separate counsel of the second defendants, and, before any objection had been carried in to his disallowance of these items, he made an interim certificate for a certain sum on account of all the items in the bill which were not then the subject of objections; and, that being so, it is now too late, under reg. 39, for the defen-

(1) [1901] 2 Ch. 652. (2) (1889) 38 W. R. 117.
(3) (1888) 20 Q. B. D. 334.

dants to carry in objections to the disallowance of these items, or for the taxing Master to entertain such objections. According to the contention of the defendants, reg. 39 is similar to Order LII., r. 26, which empowers the taxing Master to make an interim certificate in certain cases without requiring a party to carry in objections before the signing of the certificate; but it is impossible so to construe reg. 39 having regard to its express terms.

Even if the defendants' objections were not carried in too late, the original decision of the taxing Master disallowing the items in question ought not to have been altered. Under reg. 8 it was for the taxing Master alone to consider whether the defendants were entitled to the items in the bill relating to the costs at the trial of the separate counsel of the second defendants, and when he had disallowed these items without objection by the defendants, and confirmed his disallowance of them by an interim certificate, it was no longer open to him to reconsider his decision and to allow these items. The observations made by this Court when the case was formerly before it to the effect that the defendants were entitled to the costs of separate representation on the appeal plainly implied that the decision of the taxing Master as to the costs of separate representation at the trial was final and should not be interfered with. The case of *Spalding* v. *Gamage* (1) was wrongly decided and should be overruled.

PICKFORD L.J. I am of opinion that this appeal should be allowed. It is an appeal from an order of Lord Coleridge J. remitting the matter to the taxing Master and directing him to restore his original decision.

The case arises thus: There are two defendants in the action, and at the trial both of them succeeded. The plaintiff appealed. While the appeal was pending, the taxing Master taxed the defendants' bill of costs in their favour, but he disallowed items in respect of attendances upon and fees of the leading and junior counsel of the second defendants on the ground that separate representation of the two defendants was unnecessary. Before the hearing of the appeal the taxing Master also issued an interim certificate which I will mention again directly. The Court of Appeal dismissed the appeal,

(1) [1914] 2 Ch. 405.

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and, on an application made on behalf of the defendants, expressed the opinion that as regarded the proceedings in that Court the cases of the two defendants were so distinct that it was right that they should be represented by separate counsel. The defendants then lodged objections to the taxation in respect of the disallowance of the items relating to the counsel for the second defendant, which the taxing Master had said that he would not allow on the ground that separate representation was unnecessary. The taxing Master having looked into the matter intimated that he would have to alter his opinion as to the costs of separate representation at the trial. The plaintiffs thereupon lodged counter-objections to any reinstatement of those items. The taxing Master in his answers to these counter-objections stated that as the Court of Appeal had expressed the opinion that separate representation was justified on the appeal, it was a fortiori that it should be allowed on the trial, and he therefore allowed the items in question. Against that allowance there was an appeal to the judge in chambers, and it came before Lord Coleridge J., who made an order remitting the matter to the taxing Master with a direction to restore his original decision. H made this order because he thought, not that on the merits the defendants were not entitled to the items in question, but that as a matter of practice after the taxing Master had signed the interim certificate it was not competent for the defendants to carry in an objection nor for the taxing Master to alter his original decision disallowing these items.

The question is whether the interim certificate was such a certificate or allocatur that any objection to the disallowance of the items in question should have been carried in before it was signed and could not be carried in afterwards. The answer depends upon Order LXV., r. 27, regs. 17 (*b*) and 39, and upon the terms of the interim certificate which was issued by the taxing Master under these regulations. Reg. 17 (*b*) provides that "The taxing officers . . . . shall have power and authority to make one or more interim certificate or certificates, allocatur or allocaturs, in any taxation for any portion or portions of the taxed costs . . . . without waiting until a certificate for the full amount can be made." Reg. 39 provides that "Any party who may be dissatisfied with the allowance or disallowance by the taxing officer, in any bill of costs taxed by

him, of the whole or any part of any items, may, at any time before the certificate or allocatur is signed . . . . carry in before the taxing officer, an objection in writing to such allowance or disallowance . . . . and may thereupon apply to the taxing officer to review the taxation in respect of the same. The taxing Master may, if he shall think fit, issue, pending the consideration of such objections, a certificate of taxation or allocatur for or on account of the remainder of the bill of costs, and such further certificate or allocatur as may be necessary shall be issued by the taxing Master after his decision upon such objections." The interim certificate issued by the taxing Master was as follows: "Objections to my taxation have been lodged by the plaintiff, and pending my consideration thereof I certify that the defendants are entitled to the sum of 280*l.* on account of the items in the defendants' said costs which are not the subject of objections, and I make this my interim certificate at the request of the defendants." The argument on behalf of the plaintiff is that the taxing Master by signing that interim certificate has signed a certificate which under reg. 39 has concluded the taxation of the bill of costs except of items which formed the subject of the then pending objections; and that he has irrevocably disallowed all such items including those now in question as then appeared disallowed in the bill of costs, that certificate thus being equivalent to a certificate specifically certifying the disallowance of those items. Whether the signing of the certificate had that effect depends entirely upon the terms of the certificate. Though the conclusion does not, perhaps, appear so clear to me as to my brothers, I think, looking at the terms of the certificate, that it is not such a certificate as prevents a subsequent objection from being taken in respect of an item previously disallowed on the bill without objection. I do not say that under reg. 39 an interim certificate might not be made which dealt with certain items allowed or disallowed up to that time without objection in such a way that it would be a certificate or allocatur the signing of which would preclude the taking of any other objection to those items. The certificate may be made either in the form allowing a sum "for," or allowing it "on account of," the remaining items in the bill which have not been objected to by either party. If the certificate were made in the form which allows a certain sum "for" the remaining items which were not the

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subject of objections, I am inclined to think that it would preclude the taking of any subsequent objections as to these items. In this case, however, the interim certificate has not been made in that form, but in the form allowing a sum "on account of" the remaining items in the bill which were not the subject of objections. The sum for which it has been issued, namely, 280*l.*, is much less than the sum payable in respect of all the items in the bill which were not then the subject of objection and which were eventually allowed by the taxing Master. It, therefore, seems clear that that certificate cannot have been issued in respect of all these items. The taxing Master might no doubt have issued a certificate certifying the allowance or disallowance of all the items which were not the subject of objections up to the time when the certificate was signed, and if he had done so I might have agreed with counsel for the plaintiff. I do not, however, think that the certificate which the taxing Master has issued is a certificate of that kind either in form or effect. That being so, I think that the certificate which the taxing Master has signed is not a certificate which prevents the carrying in of objections at any time after it has been signed, but that it is open to the parties to carry in objections up to the time of the signing of the final certificate.

It is further said that even though the objection could be taken after the signing of the certificate, the taxing Master should not have allowed it, inasmuch as his original decision, that the separate representation of the second defendants was unnecessary, and that the costs of it should not be allowed, was right. As to that I merely say that, when the case was formerly before the Court of Appeal, the Court expressed the view that separate representation might be allowed upon the appeal. It was for the taxing Master to consider, having regard to that expression of opinion, whether it should not be allowed at the trial also. On reconsideration he thought that it should, and that he must reverse his original decision. I think he was entitled to do so, and I see no reason to differ from his later view. In my opinion the appeal should be allowed.

WARRINGTON L.J. I am of the same opinion. In this case the main question is whether or not the defendants are precluded from objecting to the proposed disallowance of certain items in their

bill of costs. The regulation as to the carrying in of objections is Order LXV., r. 27, reg. 39. The earlier part of that regulation provides that "Any party who may be dissatisfied with the allowance or disallowance . . . . of any items, may, at any time before the certificate or allocatur is signed . . . . carry in . . . . an objection in writing to such allowance or disallowance." Under that regulation it is thus a condition precedent to the right of a party to apply to the taxing Master to review the taxation that he should have carried in objections to the taxation. The question here is whether under that regulation it is open to a party to carry in an objection to the taxation and to the taxing Master to review it after the taxing Master has issued an interim certificate and at any time before he has signed his final certificate or allocatur. In this case the taxing Master in going through the bill of costs had expressed the view that separate representation of the two defendants was unnecessary and had indicated an intention to disallow certain items including the costs of counsel for the second defendants. The plaintiff lodged objections in respect of the allowance of these and other items, and the taxing Master disallowed the items relating to the counsel for the second defendants. At that time the taxing Master had issued no certificate, and it was open to the defendants to carry in objections to the disallowance of these items, but they did not then do so. The taxing Master then issued an interim certificate under reg. 39. The concluding sentence of that regulation is: "The taxing Master may, if he shall think fit, issue, pending the consideration of such objections, a certificate of taxation or allocatur for or on account of the remainder of the bill of costs, and such further certificate or allocatur as may be necessary shall be issued by the taxing Master after his decision upon such objections." It may be observed that the regulation does not there say in regard to the final certificate that it shall deal with the items which were the subject of the objections pending when the interim certificate was issued, as if these were the only items left undisposed of by the interim certificate, but in regard to that further or final certificate it uses wide words, namely, that the taxing Master after his decision upon such objections shall issue such further certificate as may be necessary.

In the present case the plaintiff's objections to the bill of costs

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covered items amounting to about 135*l.* The bill as ultimately allowed by the taxing Master amounted in all to 550*l.* and must thus have comprised items amounting to at least 415*l.* to which no objection was taken by the plaintiff. The interim certificate of the taxing Master had allowed the defendants a round sum of 280*l.*, not "for," but "on account of," the remainder of the bill of costs to which objection had not been taken. Was that a certificate or allocatur which prevented the carrying in of further or other objections? I think it clearly was not. In my opinion the certificate referred to in the earlier part of reg. 39 which precludes the subsequent carrying in of objections to particular items is a certificate which deals finally with these particular items. In this case the taxing Master by giving an interim certificate for a sum "on account of" the remainder of the defendants' costs which were not the subject of objection, these remaining costs being eventually allowed at a figure greatly exceeding that sum, gave a certificate which did not deal with any particular items of these remaining costs, and therefore he was not precluded from afterwards allowing the items in question. I do not say that the taxing Master might not have given an interim certificate which disposed finally and completely of certain items in the bill and prevented any subsequent objection from being taken as to these items. I think he could have done so. In this instance, however, he has abstained from doing so and has given the certificate only for a round sum "on account of" items which were not the subject of objections. I may add that the taxing Master was certainly not precluded from allowing the items in question by having previously stated that he proposed to disallow them.

The only other question is that which arises on the merits, namely, whether the taxing Master was right in allowing the costs of separate counsel for the two defendants. I think that each of the defendants was entitled to separate counsel, and in any case I think that the taxing Master was entitled to treat the remarks of the Court of Appeal when the case was previously before it, to the effect that the two defendants were entitled to separate counsel, as binding upon him.

SCRUTTON L.J. In this case the plaintiff brought an action against two defendants who appear to have had separate interests.

She failed to recover, and Shearman J. gave judgment against her with costs to be taxed. The taxing Master thought that the two defendants were not entitled to be represented by separate counsel, and he indicated at the taxation of the bill of costs that that was his view and that the items in respect of the separate counsel of the second defendants should be disallowed. The plaintiff took objection to these and certain other items in the bill of costs. Shortly afterwards the taxing Master issued an interim certificate by which, pending his consideration of these objections, he certified that the defendants were entitled to 280*l.* on account of the remaining items. There was then an appeal from the judgment of Shearman J. to the Court of Appeal, and that Court expressed the opinion that on the appeal the two defendants were entitled to be represented by separate counsel. Afterwards, but before the taxing Master had issued his final certificate or allocatur, the defendants took objections to the taxation so far as it disallowed the items relating to the counsel of the second defendants on the trial. The taxing Master then stated that he would have to change his view as to the costs of separate representation at the trial; and in his answers to counter-objections that had been lodged by the plaintiff he stated that if, as the Court of Appeal thought, separate representation was justified on the appeal, it was a fortiori justifiable at the trial of the action, and he reviewed his taxation and allowed the defendants' objections, allowing them the costs of separate representation at the trial. Lord Coleridge J. made an order directing the taxing Master to restore his original decision, and against that order the defendants appeal.

It is said on behalf of the plaintiff that the taxing Master had no power to change his original view and to allow the defendants' objection to the disallowance of the items in question. The contention is that the taxing Master has given his certificate under Order LXV., r. 27, reg. 39, and that that precludes him as regards items which he had disallowed, and in respect of which objections had not been taken, from considering any subsequent objection or from changing his mind or varying his certificate. I agree that in certain events the issuing of a certificate would prevent the taxing Master from changing his mind. If he issues a certificate dealing specifically with certain items for a specified amount covering

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these items, I can understand that it is not open to him to reconsider the question whether or not these items should be allowed. It may also be, if the taxing Master has under reg. 39 fixed a time for the carrying in of objections to particular items by the parties and they have not brought in objections within that time, that he would be prevented from considering subsequent objections in regard to these items. Here, however, the taxing Master did not issue a certificate dealing specifically with particular items, or fix a time for the bringing in of objections to particular items. He merely issued a certificate which allowed a round sum of 280*l.* "on account of" the items in the defendants' bill of costs which were not the subject of objections. As I understand the argument, it is that a certificate for 280*l.* on account of items not the subject of objection is the same as a certificate for 280*l.* and no more in respect of these items. I cannot take that view. It seems to me that this certificate did not prevent the defendants from raising the objection to the disallowance of the items in question, or the taxing Master from entertaining the objection and allowing the items, but that the objection could be taken and considered at any time before the final certificate or allocatur was made.

The provision in this interim certificate that the defendants are entitled to the sum mentioned on account of their costs is a provision in the defendants' favour, and why an interim certificate which is in the defendants' favour should prevent them from taking an objection to other items, or the taxing Master from considering the objection, I cannot understand.

In my opinion the view of the learned judge was wrong and that of the taxing Master was right.

Appeal allowed.

Solicitors for appellants: *Knapp-Fisher & Sons.*
Solicitors for respondent: *Dale & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

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May 10, 13; *June* 17.

COLE *v.* DE TRAFFORD (No. 2).

Negligence—Master and Servant—Injury to Servant—Duty of Master—Defect in Premises—Defect not known to Master or Servant.

The plaintiff entered the defendant's service as a chauffeur. The defendant's garage had folding doors. In the upper part of one of the doors there was a glass window, the top of which was 8 feet 5 inches above the ground. The glass was ½ inch thick and weighed about 20 lbs. About a fortnight after the plaintiff had been in the defendant's service, as he was opening the door in order to take in the defendant's car the glass in the window fell out on to his hand and injured it. On examination it appeared that the inside beadings which with some putty kept the glass in position were missing at the top and one of the sides, and that at some time a nail had been driven into the wood of the door at one of the top corners of the window to secure the glass. In an action to recover damages for the injuries owing to the negligence of the defendant in not having had the garage inspected, when the dangerous condition of the window would have been discovered, there was evidence that this dangerous condition must have existed for some months, but it was not known either to the plaintiff or to the defendant. There was no evidence whether a garage ought to be periodically inspected, nor when the defendant's garage was inspected, if at all, nor how long the defendant had been in occupation of it:—

Held, that there was no evidence of personal negligence in the defendant, and that therefore she was not liable.

Judgment of the Divisional Court [1918] 1 K. B. 352 affirmed.

APPEAL from the judgment of a Divisional Court (Lawrence and Shearman JJ.) on appeal from the Bloomsbury County Court: reported [1918] 1 K. B. 352.

The plaintiff brought an action against the defendant, who was the wife of Sir Humphrey de Trafford, claiming damages for personal injuries sustained by him through the negligence of the defendant.

The facts are stated in the report below and in the judgment of Pickford L.J.

At the end of the plaintiff's evidence it was submitted on behalf of the defendant that there was no case to go to the jury. The point was reserved, and subject thereto the case was left to the jury. The defendant only called medical evidence. The county court

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judge put questions to the jury which with their answers were as follows:—1. Were the premises in a defective and dangerous condition?—Yes. 2. Was the defendant negligent (*a*) in not discovering the defect; (*b*) in not remedying the defect?—Yes, to both questions. Damages 70*l*.

The judge, after consideration of the point reserved, held that there was no evidence of negligence on the part of the defendant. He therefore gave judgment for the defendant.

The Divisional Court held that the owner of a garage owed a duty to his chauffeur to take reasonable care to maintain the premises in a condition free from any concealed danger of which the owner was aware or ought to have been aware. On the facts Lawrence J. held that there was no evidence of a breach of this duty; Shearman J. held that there was such evidence. The judgment of the county court judge was therefore affirmed.

The plaintiff appealed.

C. T. Williams and *E. Lewis Davies* for the plaintiff. The defendant's duty was to take reasonable care to keep the premises in a safe condition so as to avoid injury to her servants: *Smith* v. *Baker & Sons*. (1) The duty is similar to that in the case of an invitor to an invitee as laid down in *Indermaur* v. *Dames* (2), namely, to take care to prevent injury to his servant from dangers of which he knows or ought to know. For this purpose it was the defendant's duty to have the premises inspected from time to time: *Webb* v. *Rennie*. (3) If that had been done the defect would have been discovered. In *Southcote* v. *Stanley* (4) the plaintiff was a mere licensee; and in *Watling* v. *Oastler* (5) the decision in *Southcote* v. *Stanley* (4) was not considered a satisfactory decision as reported. The doctrine res ipsa loquitur applies: *Scott* v. *London and St. Katharine Docks Co.* (6); *Briggs* v. *Oliver* (7); *Kearney* v. *London, Brighton, and South Coast Ry. Co.* (8); *Chaproniere* v. *Mason*. (9) The plaintiff therefore is entitled to judgment. [*Pritchard* v. *Peto* (10), *Leaver*

(1) [1891] A. C. 325, 362, 363.
(2) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.
(3) (1865) 4 F. & F. 608.
(4) (1856) 1 H. & N. 247.
(5) (1871) L. R. 6 Ex. 73, 77.
(6) (1865) 3 H. & C. 596.
(7) (1866) 4 H. & C. 403.
(8) (1870) L. R. 5 Q. B. 411; (1871) L. R. 6 Q. B. 759.
(9) (1905) 21 Times L. R. 633.
(10) [1917] 2 K. B. 173, 176.

v. *Pontypridd Urban Council* (1), and Macdonell on Master and Servant, 2nd ed., p. 279, were also referred to.]

du Parcq, for the defendant. There is no evidence of any personal negligence in the defendant. There is no evidence as to how often a garage should be inspected, nor when this garage was last inspected, nor how long the defendant has been in possession of the premises. The principle stated in *Indermaur* v. *Dames* (2) does not apply to the case of master and servant. The rule laid down in *Priestley* v. *Fowler* (3), *Southcote* v. *Stanley* (4), and *Seymour* v. *Maddox* (5), as to the risks which a servant undertakes is still good law: *Burr* v. *Theatre Royal, Drury Lane.* (6) "The master is not, and cannot be, liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do": per Lord Cairns L.C. in *Wilson* v. *Merry* (7); and then he goes on to state that what the master is bound to do, "in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do." See also *Williams* v. *Birmingham Battery and Metal Co.* (8) The doctrine res ipsa loquitur cannot apply, because it is not enough to show negligence in some one; negligence in the defendant must be shown. The negligence here, if any, may have been that of a fellow servant, though no longer in the service of the master: *Wilson* v. *Merry.* (9) [*Griffiths* v. *London and St. Katharine Docks Co.* (10) was also referred to.]

C. T. Williams in reply.

Cur. adv. vult.

June 17. PICKFORD L.J. read the following judgment:—This case has an unfortunate history. The plaintiff was injured while in the service of the defendant, and so far as appears from the facts before us would have had an undoubted claim for compensation

(1) (1911) 76 J. P. 31.
(2) L. R. 1 C. P. 286, 287.
(3) (1837) 3 M. & W. 1.
(4) 1 H. & N. 247.
(5) (1851) 16 Q. B. 326.
(6) [1907] 1 K. B. 544.
(7) (1868) L. R. 1 H. L. Sc. 326, 332.
(8) [1899] 2 Q. B. 338.
(9) L. R. 1 H. L. Sc. 332.
(10) (1884) 13 Q. B. D. 259.

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under the Workmen's Compensation Act. He or his advisers preferred to bring an action at common law, in which it was necessary for him to prove negligence on the part of the defendant. The case was tried in a county court, and a verdict returned for the plaintiff with 100*l.* damages. The county court judge ordered a new trial on the ground that the damages were so excessive that the verdict could not stand. Against this decision the plaintiff appealed and failed. (1) The case then came on for a new trial before the same county court judge, and at the end of the plaintiff's case the defendant's counsel submitted that there was no evidence of negligence on the part of the defendant. The county court judge wisely determined to take the opinion of the jury, and reserve the point as to whether there was any evidence proper to be left to them. The defendant's counsel decided to rest his case as to liability on his legal submission, and called no evidence except that of one doctor as to the nature of the plaintiff's injuries. The jury returned a verdict for the plaintiff for 70*l.* The county court judge considered the amount rather too much, but that matter became immaterial, because on consideration he decided that there was no evidence of negligence, and entered judgment for the defendant. The plaintiff appealed to the Divisional Court, where the judges differed in opinion, Lawrence J. agreeing with the county court judge that there was no evidence to go to the jury, while Shearman J. was of an opposite opinion. This appeal was then brought, and it is evident from this statement of the facts that, whatever the final result of embarking on the difficult question of the obligations of a master towards his servant may be, the net amount which in any event could reach the plaintiff's hands would be very small.

The facts were as follows: The plaintiff had been a chauffeur in the defendant's service for about a fortnight, when one morning as he was opening the garage door from the inside a heavy piece of glass fell from the top of the door on his arm and cut it badly. The glass had been let into a space cut in the top of the door for the purpose of giving light to the garage, and was so fixed as not to open. There was evidence that it was of an unusual thickness and of the kind of glass used for pavement lights, and in consequence did not allow space for a sufficient beading, but that if the beading which

(1) [1917] 1 K. B. 911.

had secured it had been intact it would have been reasonably safe and would have lasted for a considerable time. In fact two pieces of the beading had come away and some one had driven a nail into the door for the purpose of holding the glass in its place. The condition of the putty round the glass showed that it must have been in this condition for a time described as "for some time," "months," and "a considerable time," and was and had been for that time dangerous. The plaintiff had constantly opened and shut the door during the fortnight he had been in the defendant's service, and had from time to time washed the glass by turning a hose pipe on to it. This involved danger, as it would loosen the glass, and showed that the plaintiff had, as he said, not noticed anything wrong with the glass, which was 8 feet 5 inches from the ground and could only be examined by the use of a ladder or something of that kind by which to reach it. There was no evidence as to whether the defendant was owner or tenant of the garage, how long she had been in occupation, who had put in the glass, when the beading had fallen out (except that which has been stated), who had driven the nail into the door or when it had been so driven, or when the last examination, painting, or repair had been done to the garage. There was also no evidence that the defendant had any knowledge of the state of the glass and door or of the garage in general.

The question we have to decide is whether on those facts there was evidence of negligence on the part of the defendant to go to the jury. This must depend primarily on the obligation of a master towards his servant, and no difference can arise from the fact that the employer in this case was a lady. A servant has been held to accept many risks of his employment, but he does not accept them all so as to leave the master without any obligation towards him. I think the master's obligation may be expressed in this way. It is an obligation not by his own personal negligence to expose the servant to danger, and what is personal negligence of the master must depend upon the facts of the particular case. I do not think the obligation can usefully be defined with greater particularity; if it be, that definition will in its turn require explanation, and in the result it will come to the question of whether in the circumstances of the case the master had personally failed to exercise reasonable

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care and skill, i.e., had been negligent. I quite agree with the form of statement of the duty by the learned judges in the Divisional Court, i.e., to take reasonable care to maintain the premises free from any concealed danger of which she was aware or ought to have been aware; but in order to apply it to any particular case the expression "ought to have been aware" must be explained, and after explanation it seems to me to mean would have known but for the failure to exercise reasonable care and skill, i.e., but for negligence. If, as I think is the case, the only possible suggestion of negligence here is that the defendant failed to secure a sufficient examination or inspection of the premises, that obligation varies according to the subject matter to be inspected. The measure of inspection required for chains or machinery liable to get out of order by use is different from that required in the case of premises, and in the case of premises the necessary amount of inspection varies according to whether they are of solid or flimsy construction, and whether they are old and dilapidated, or new and in good condition. As there was no evidence of any knowledge by the defendant of the defect, or any report to her of the loss of the beading or the fixing of the nail, or any evidence that if she had gone to look round the garage she would have discovered the defect any more than the plaintiff himself discovered it, the only question left is whether there was evidence that she negligently failed to secure a proper inspection of the premises.

It was argued before us that this was a case to which the maxim "res ipsa loquitur" applies. I take that well-known expression to mean that an accident may by its nature be more consistent with its being caused by negligence for which the defendant is responsible than by other causes, and that in such a case the mere fact of the accident is prima facie evidence of such negligence. This principle may be applicable to a case of master and servant, but clearly it is more difficult of application, because in such a case the nature of the accident must be more consistent with the master's personal negligence than with any other cause, including amongst such other causes the negligence of a fellow servant. In the well-known case always cited for this principle of *Byrne* v. *Boadle* (1) the fall of the barrel was more consistent with negligence on the part of the defen-

(1) (1863) 2 H. & C. 722.

dant or his servants than with any other cause, but if it had been necessary to show that the barrel fell by the personal negligence of the defendant I do not think the mere fact of the accident would have been evidence of such negligence. In the same way in the case of *Kearney* v. *London, Brighton, and South Coast Ry. Co.* (1) the fall of the brick from the bridge was of itself no evidence of personal negligence on the part of the directors though it might well be evidence of negligence on the part of servants for whom they were responsible to a stranger.

In this case the nature of the accident itself is not any more consistent than inconsistent with the defendant's personal negligence. But we are not left to draw a conclusion from the accident alone, and have evidence up to a certain point as to how it happened. It happened from a condition of things which had existed for some months not known to the defendant, not discoverable by ordinary observation, as is shown by the plaintiff's own evidence and conduct, and discovered at some unknown time by some unknown person who may or may not have been in the defendant's employment. Evidence was given that "some one should periodically have looked to see if the glass was properly secured," but no evidence was given as to the usual or proper periods at which such premises should be examined, when these premises had last been examined, or whether the condition of the door was such that it must have existed for more than the time which in ordinary and reasonable practice would elapse between one examination and another. It was argued that, as the surveyor gave evidence that the premises should be periodically examined, and as the Courts have in several cases stated that examination should be made "from time to time"—e.g. *Kearney* v. *London, Brighton, and South Coast Ry. Co.* (2)—the jury were at liberty without any evidence to form their own conclusion as to whether the defendant had exercised reasonable care and skill in the examination of these premises. I think this contention is wrong. There may be matters so universally known that a jury may act on their own knowledge, but on a matter so varying as the proper measure and periods of inspection of particular premises—a matter on which probably few, if any, of a county court jury have any experience—I think they cannot. I think this is a case to which

(1) L. R. 6 Q. B. 759. (2) Ibid. 762.

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the words of Bailhache J. in *Pritchard* v. *Peto* (1) are particularly applicable: "The plaintiff, if he desired to establish the fact that her (the defendant's) ignorance was due to neglect of some reasonable precaution, should have given some evidence to show what precautions are usual and proper for occupiers of houses with projecting cornices to take, and that she failed to take them"; and I find that in cases in which the employer has been held liable for non-inspection such evidence has been given: see *Webb* v. *Rennie* (2) and *Murphy* v. *Phillips*. (3)

There was, in my opinion, on the evidence given in this case, nothing more consistent with the existence of personal negligence by the defendant than with its absence, and therefore I agree with the decision of the county court judge and of Lawrence J. The appeal must be dismissed with costs.

BANKES L.J. read the following judgment:—The question raised by this appeal is whether the county court judge was right in entering judgment for the respondent upon the ground that the appellant had given no evidence in support of his case proper to be submitted to the jury. The Divisional Court were divided in opinion, Lawrence J. holding that the ruling of the county court judge was right, Shearman J. taking the opposite view. [The Lord Justice recapitulated the material facts.] It was obvious from the evidence as to the height of the pane from the ground and the position of the nail that the insecure condition of the pane was not apparent to any one standing on the ground and looking at the door. The condition of things could only have been discovered by some one making a special examination of the door, or having occasion to mount a ladder for the purpose of painting the door, or some similar purpose, and so discovering the defect. The appellant himself had been in the habit of cleaning the glass with a hose, which was obviously the worst possible thing to do under the circumstances, and indicated very clearly that the appellant had never noticed anything wrong with the glass. There was no evidence as to whether the glass was the glass originally put in when the door was made. I should gather from the evidence given by the surveyor called for the

(1) [1917] 2 K. B. 173, 176. (2) 4 F. & F. 608, 612.
(3) (1876) 35 L. T. 477.

appellant that it was. There was no evidence as to when the beading came away or when the nail was inserted. The only witness called to speak to the state of the door was the surveyor called by the appellant, and what he said was this: "Door not constructed to allow sufficient beading"; by which I understand him to mean that, having regard to the thickness of the glass used, the door was not constructed so as to allow room for a sufficient beading. "There was originally three-eighth beading, but the side and top were missing when I was there. Some one had put in a French nail at the top corner to steady loose corner of glass. It must have been loose for some time, months, from the appearance of the putty. Pushing the door open might cause the glass to fall. It was in a dangerous condition and had been so for a considerable time."

The question which has been discussed in the Courts below and in this Court is as to the duty which the respondent owed to the appellant under the circumstances disclosed by the evidence. One point is quite clear, namely, that the only duty which the respondent owed to the appellant was the duty which the law imposed upon the respondent by reason of the fact that the appellant was her servant. Whether the action is founded in contract or in tort, it is well established that in the absence of any special provisions the law presumes that the servant in entering into the contract of service undertakes as between himself and his master to run the ordinary risks which are incidental to the employment. This rule of law places a far-reaching limitation upon the duty which a master owes to his servant. The present is a case in which the contract between the parties contained no special provisions. Unless, therefore, the appellant gave some evidence to show either that the risk to which he was exposed was not an ordinary risk incidental to his employment, or that his case fell within some of the recognized limitations upon or exceptions to the rule, the county court judge was right in refusing to allow the case to go to the jury.

So far as the nature of the risk is concerned, I find nothing in the evidence to distinguish the risk to which the appellant was exposed from the ordinary risk to which every domestic servant is exposed from accident arising from such causes as the falling of a picture or of a curtain pole, or the breaking of the leg of a chair or a table,

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due to some defect. All such accidents appear to me to fall within the class of accidents resulting from ordinary risks incidental to the particular employment. Although the risk may in this sense be an ordinary one, yet the case may fall within one of the recognized limitations upon the rule. One only of these limitations need be considered, namely, where the risk is due to the personal negligence of the employer. In such a case the law does not recognize the personal negligence of the employer as an ordinary risk, or one which as between himself and the servant the latter undertakes: see per Crompton J. in the report of *Holmes* v. *Clarke* in the *Law Journal*. (1) What will amount to personal negligence on the part of the employer must depend upon the circumstances of each case. It is impossible to lay down any general rule which will apply to every case. Some cases are clear, as for instance where the defect which occasioned the injury to the servant was known to the employer, and was known by him to be dangerous, and yet he neither warned his servant nor took any steps to have the defect remedied: see *Williams* v. *Birmingham Battery and Metal Co.* (2) In cases where a master employs a servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risks: per Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (3); and see *Holmes* v. *Clarke* (1); *Murphy* v. *Phillips*. (4) The rule would no doubt apply where a master employed a servant to work in premises which he knew to be dilapidated and consequently dangerous. But in my opinion it cannot be said as a matter of law that a master is under any duty to his servants to have any periodical or other examination of ordinary domestic premises, which are apparently in good condition, for the special purpose of discovering whether any defects exist which may be a possible source of danger to the servants employed upon the premises. If a custom or practice to have such an examination exists in any district or under any particular circumstances, it must be proved by evidence and the line must be drawn between suggestions of possible precautions and evidence of actual negligence such as ought reasonably and

(1) (1862) 31 L. J. (Ex.) 356, 360. The case is also reported in 7 H. & N. 937.

(2) [1899] 2 Q. B. 338.

(3) (1858) 3 Macq. 266, 288.

(4) 35 L. T. 477.

properly to be left to the jury: *Crafter* v. *Metropolitan Ry. Co.* (1)

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In the present case there was, in my opinion, no such evidence. The surveyor called for the plaintiff stated that "some one should periodically have looked to see if the glass was properly secured." I read this statement as an expression of opinion by a person who knew the kind of glass which had been used, and the way in which it had been originally secured, and not as an expression of opinion as to a general duty in regard to the periodical examination of the premises. Even assuming that this is not so, and that the statement amounts to something more than a suggestion of a possible precaution, I do not think that the mere statement of the duty is sufficient without some evidence of the breach of it. The fact that the glass fell is no evidence itself of any breach of the duty. No evidence was given as to the circumstances under which the respondent was in occupation of the garage, or how long she had been in occupation. Even assuming a periodical examination (whatever that loose expression may mean) of the premises was a usual or necessary precaution to take, there was no evidence that the particular period of time had elapsed between the date when the respondent's occupation of the premises commenced and the date when the accident happened.

In my opinion the view taken by the county court judge was correct, and this appeal fails.

SCRUTTON L.J. read the following judgment:—Cole was a chauffeur to Lady de Trafford, and while opening the door of the garage in which her car was stored a heavy bit of glass fell from the door above his head and injured his hand. Inspection showed that the heavy glass had been originally held in by wooden beadings only secured with putty, that the top and one side beading had fallen away, and that some one had put in a nail to hold the glass. This state of things had apparently existed for "some time," or "a considerable time," by the appearance of the putty. Cole had been there a fortnight and had not noticed the state of the window. Cole was not contented with his undoubted claim under the Workmen's Compensation Act, and sued at common law "by reason of the

(1) (1866) L. R. 1 C. P. 300, 304.

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negligence of the defendant in not discovering and/or remedying the defective condition."

There was no evidence at the trial as to how long the defendant had been in occupation of the premises, and whether she held as owner or tenant, or if as tenant, on what terms as to repairs. There was no evidence who put in the nail or when it was put in. There was no evidence that the defendant knew anything about the defect. There was no evidence what, if any, arrangements the defendant had made for inspection of the premises, or what were usual and customary precautions as to inspection to take in the case of such windows which are not made to open. The county court judge very wisely took the opinion of the jury, who found (1.) that the premises were in a defective or dangerous condition, and there was clearly evidence on which they could so find; (2.) that the defendant was negligent (*a*) in not discovering the defect, and (*b*) in not remedying the defect. The county court judge "assumed that the defendant owed a duty to the plaintiff to take reasonable care to have the garage in a safe condition, or at all events to ascertain whether it was in such a condition and warn the plaintiff," and with some hesitation found that mere absence of inspection for some time was not evidence of any breach of such a duty. The judges in the Divisional Court differed; both agreed that the measure of duty was "to take reasonable care to maintain the premises in a condition free from any conccaled danger of which she was aware or ought to have been aware"; but Lawrence J. held there was no evidence on which the jury could find a breach of that duty, while Shearman J. thought there was. The plaintiff appeals to this Court.

It is now firmly established by decisions of the House of Lords—*Bartonshill Coal Co.* v. *Reid* (1), and *Wilson* v. *Merry* (2) (affirming the view taken by the English Courts in *Priestley* v. *Fowler* (3) and *Hutchinson* v. *York, Newcastle, and Berwick Ry. Co.* (4), and approving the reasoning of Shaw C.J. in *Farwell* v. *Boston and Worcester Railroad Corporation* (5))—that it is an implied term in the contract between master and servant that the master is not liable for any damage to the servant by the negligence of his fellow servants how-

(1) 3 Macq. 266.
(2) L. R. 1 H. L. Sc. 326.
(3) 3 M. & W. 1.
(4) (1850) 5 Ex. 343.
(5) (1842) 45 Mass. 49; reprinted in 3 Macq. 316.

ever highly placed in superintendence. But it is also now well established that the master is liable for his own negligence; that, though he is not liable for the negligence of fellow servants, he is bound to use reasonable care to select those fellow servants, and is liable if he fails to do so and the negligence of the incompetent fellow servant causes damage; and that he is bound to use reasonable care to provide safe premises and appliances for his servant to work in and with, and to use reasonable care to keep them safe. See the two decisions of the House of Lords in *Paterson* v. *Wallace & Co.* (1) and *Brydon* v. *Stewart* (2), the statement of Lord Herschell in *Smith* v. *Baker & Sons* (3), and the judgment of Kennedy L.J. in *Young* v. *Hoffmann Manufacturing Co.* (4) The master does not absolutely warrant safety, and if he has used reasonable care to appoint a competent person to inspect he is not liable to his servant for the negligence of such an inspector. But if he knows of defects and does not remedy them or warn the servant he is liable; and if he ought to know of defects by inspection "from time to time," to use a phrase used by several authorities,—Kelly C.B. in *Murphy* v. *Phillips* (5), Blackburn J. in *Tarry* v. *Ashton* (6), and Kelly C.B. in *Kearney* v. *London, Brighton, and South Coast Ry. Co.* (7)—he is liable if by failure himself to inspect or to take reasonable care to appoint a competent person to inspect he does not discover a defect which would have been discovered by reasonable inspection. This does not mean continuous inspection; inspection at reasonable intervals and in a reasonable way is sufficient; and in the cases in which such a liability has been enforced evidence has been given of the kind of precautions to be taken. Thus in *Webb* v. *Rennie* (8), in 1865, where a servant was injured by the fall of a scaffold pole, which had rotted underground, Cockburn C.J. charged the jury as follows: "The law upon the subject up to a certain point was clear—viz., that where a particular service necessarily involves a certain amount of danger, the servant who engages in the employment must submit to the risks attendant upon it in the course of its ordinary conduct and management; but that, on the other hand,

(1) (1854) 1 Macq. 748.
(2) (1855) 2 Macq. 30.
(3) [1891] A. C. 325, 362.
(4) [1907] 2 K. B. 646, 656, 657.
(5) 35 L. T. 478.
(6) (1876) 1 Q. B. D. 314, 319.
(7) L. R. 6 Q. B. 762.
(8) 4 F. & F. 612, 613.

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the servant had a right to expect that he shall only be exposed to the ordinary risks of the employment, and that the machinery or apparatus about which he is to be employed, and out of which danger arises, shall be attended to with reasonable care, to ensure its being in a fit state to be worked without undue or extraordinary danger to those employed in or about it; and although in general an employer was not liable unless he knew of the danger, yet it was his business to know if, by reasonable care and precaution, he could ascertain whether the apparatus or machinery was in a fit state or not. It was not enough, therefore, that the master did not know of the danger if, by reasonable care, he might have known, and if, reasonably, he ought to have known, and to have taken the proper means of knowing. It followed that, although he would not be liable merely on account of the negligence of his servants, yet it was his duty either himself to take the proper means of knowing of the danger, or to employ some competent person to do so . . . . all that could be reasonably expected of him would be that he should employ some competent person from time to time to examine it. The master must either ascertain the state of the machinery or apparatus himself, or employ some competent person to do so; and if he did employ such a person, and a workman was injured in consequence of that person's neglect of his duty in that respect, the master would not be liable to one of his servants for such negligence of a fellow servant in the particular matter." In that case evidence was given on each side as to the time for which poles buried in the ground might remain sound, so that they need not be inspected. In *Murphy* v. *Phillips* (1), in 1876, where a servant was injured by the breaking of a defective chain, evidence was given as to well-known methods of testing chains none of which had been used, and it was held that it was the duty of the master to have the chains used in his business properly and duly examined and tested from time to time. In *Brown* v. *Accrington Cotton Co.* (2) a person erecting premises was held not liable to a workman on the premises by reason of a defect in the construction of the building, unless he personally interfered or appointed a negligent superintendent with knowledge of his incompetency.

In the present case a servant sues his master for damage caused

(1) 35 L. T. 477. (2) (1865) 3 H. & C. 511.

by a defect in the premises. He must show that the master did not take reasonable care to remedy the defect, either because he knew of it and did nothing, or because he ought to have known of it and so was negligently ignorant. Here it is not suggested that the master knew of the defect; was there evidence he ought to have known of it. For this purpose, if he has delegated the duty of inspection to a person selected with reasonable care, he will not be liable for that person's failure to discover the defect, or to inform the master if he has discovered the defect: per Cockburn C.J. in *Webb* v. *Rennie*. (1) This ruling of the Lord Chief Justice appears to be in accordance with the authorities. Thus in *Wigmore* v. *Jay* (2) a master who had appointed a competent person to construct a scaffolding, and then employed a workman to work on the scaffolding, was held not liable for an accident caused to the workman by the foreman having negligently used an unsound pole in the scaffolding. So in *Wilson* v. *Merry* (3) the employer was held not liable, where a foreman had negligently constructed a platform in a mine making the mine unsafe through defective ventilation, to a workman subsequently employed and injured by an explosion caused by such defective ventilation. And in *Feltham* v. *England* (4) a similar ruling was given in the case of defective brickwork. The master's obligation, if he knows or ought to have known of danger, is limited by the rule by which he is not liable for the negligence of fellow workmen of the injured man. Knowledge is not imputed to him because a fellow workman knew and negligently did not remedy or ought to have found out danger and negligently did not discover it. The negligence must be personal negligence of the employer. In this respect it appears to me that the liability of a master to his servant is narrower than the liability of invitor to invitee as stated in *Indermaur* v. *Dames* (5), the effect of which decision the Divisional Court adopt as the measure of liability in this case. The master against whom it is alleged, not that he knew, but that he ought to have known, will succeed unless it is shown that he had not made or caused to be made an inspection, when by the practice of reasonably careful householders he ought by himself or his servants to have inspected; and even then if he

(1) 4 F. & F. 613.
(2) (1850) 5 Ex. 354.
(3) L. R. 1 H. L. Sc. 326.
(4) (1866) L. R. 2 Q. B. 33, 36, 37.
(5) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

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took reasonable care to appoint a person to inspect, who nevertheless by negligence did not discover, or remedy, or report, he will not be liable to his injured servant for injuries caused by this negligence of the fellow servant.

It is said here that "res ipsa loquitur." The accident does talk, but all it appears to me to say is that there was a defect in the premises of some standing, which would have been discovered by reasonable inspection when that inspection was made; and that some one unknown did discover it, and applied an improper and imperfect remedy. I do not think it is an illegitimate inference to find that the person who discovered it was a servant of the person who was then in occupation of the premises. This the accident seems to me to inform us. It does not inform us how long the defendant has been in possession of the premises, or whether the person who put the nail in it was a servant of the defendant or not. It does not inform us whether the defendant has been in possession so long that according to the practice of reasonably careful people she would have examined, or caused to be examined, this window (which is not a window made to open) for latent defects. For I do not know of any obligation on a new occupier entering premises apparently free from defect to examine the whole premises for latent defects, either immediately on entry, or on the entry of each fresh servant. And I do not think a county court jury, who are not as a rule people who keep motor cars, are entitled to find without evidence what is the ordinary practice as to examination of a garage. It appears to me that, while the accident tells me something, it leaves untold a state of things which, according to the true facts, may make or may not make the defendant liable. And to prove a state of facts consistent with liability or non-liability does not support the plaintiff's case: *Wakelin* v. *London and South Western Ry. Co.* (1), where the jury had seen the level crossing on which the man was found and the curve approaching it, but their verdict was set aside.

I have come to the conclusion that the county court judge was right in entering judgment for the defendant on the evidence as given at the second trial, but with some regret. For I think one or two judicious interrogatories, or a little more evidence at the

(1) (1886) 12 App. Cas. 41.

trial, might have turned the scale the other way. The plaintiff has, however, his compensation under the Workmen's Compensation Act, and I am sorry he was not content with this instead of being induced to enter on legal proceedings which were more likely to benefit his legal advisers than himself, and which have resulted disastrously to him. One may regret that the decision in *Priestley* v. *Fowler* (1) was ever given, but it is not, in my view, possible for the Court of Appeal now to disturb it.

Appeal dismissed.

Solicitors for plaintiff: *Berry Tompkins & Co.*
Solicitors for defendant: *Eardley Holt, Lightly & Slater.*

W. F. B.

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June 24, 28

[1917 T. 812.]

Damages—Measure of—Repudiation by Employer of Contract with Theatrical Artiste—Loss of Publicity.

There is no reason in law why a plaintiff in an action for breach of contract should not, in an appropriate case, recover damages for loss of publicity caused by the defendant's breach of contract. Whether damages for loss of publicity can be recovered in any case depends primarily on the nature and true construction of the contract, and secondarily on the special circumstances known to both parties at the time of making the contract.

The defendants entered into a contract whereby they engaged the plaintiff, a music-hall artiste, to perform at their music-hall for specified periods in four successive years at a weekly salary. The music-hall was well known and was regarded as a West End place of entertainment, and approbation by audiences there opened the gateway of London success to the artiste. The contract contained no clause which placed on the defendants any express or implied obligation to allow the plaintiff to appear and perform at their music-hall during the contract periods. The plaintiff brought an action against the defendants for damages for breach of contract, alleging that they had wrongfully repudiated their bargain with her. She claimed damages (*a*) for loss of salary, (*b*) for loss of publicity arising from the refusal of the defendants to permit her to perform. No evidence was given at the trial that it was the

(1) 3 M. & W. 1.

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common intent of the parties, at the date of the contract, that enhanced publicity should follow from the plaintiff's appearance at the defendants' hall, and the defendants entered into the contract upon no other basis than the business engagement of an artiste at the salary they agreed to pay, no element of publicity to the plaintiff entering into their part of the bargain. The jury found that the defendants had committed the breach of contract alleged and assessed the damages at 100*l.* for loss of salary, and 100*l.* for loss of publicity:—

Held, that, on the contract and in the circumstances, damages for loss of publicity were not recoverable in law, and that there must be judgment for the plaintiff for 100*l.* only for loss of salary.

Bunning v. *Lyric Theatre* (1894) 71 L. T. 396 and *Marcus* v. *Myers* (1895) 11 Times L. R. 327 distinguished.

FURTHER CONSIDERATION in an action tried before McCardie J. and a common jury.

The action was brought by the plaintiff, Mrs. Turpin, a music-hall artiste, whose stage name was Lily Lena, to recover damages from the defendants for breach of a contract (substantially in the form known as the "Askwith Award" contract), dated May 19, 1916.

By the contract, which contained thirty-nine clauses, the defendants by their agent, Mr. Alfred Butt, engaged the plaintiff, and the plaintiff accepted the engagement and agreed to perform during it at the Victoria Palace at two performances every evening for the periods stated in the agreement during the years 1917, 1918, 1919, and 1920 at a salary of 25*l.* per week. Clause 4 provided that the artiste should not for certain periods perform at any place of amusement within a specified radius of the Victoria Palace. Clause 10 provided that in case the plaintiff should, except through illness or accident, fail to perform at any performance she should pay to the management certain sums as liquidated damages. By clause 23 the plaintiff was required to send to the defendants particulars of all matters for programmes, billing and advertisements, and the words of all songs to be used during the engagement. Clause 26 provided that artistes must be in attendance at least ten minutes before the time named by the management for their appearance on the stage, and that the management might vary the times specified for appearance at their discretion. Clause 28 gave power to the management to prohibit any part of the performance they considered unsuitable or displeasing to the audience, and to require a copy of songs to be

forwarded for approval two weeks before being sung. By clause 33 it was provided that "the management shall have the sole right to determine the position of the artiste's name, the size and nature of the type, and the description of the turn on bills, programmes and advertisements."

The following statement of the facts is taken from the judgment of the learned judge :—"The point of law arising in this case is one of general importance to actors, public singers, and music-hall artistes. The plaintiff is a well-known performer at music-halls. She is professionally known as 'Lily Lena.' The defendants are the proprietors of the Victoria Palace, London.

"In May, 1916, the parties entered into a written contract whereby the defendants engaged the plaintiff to perform at the Victoria Palace for specified periods in the years 1917, 1918, 1919, and 1920. Her salary was fixed at 25*l.* per week. The contract contains many provisions. I will refer to them hereafter.

"The case was tried before me with the assistance of a jury. The plaintiff's claim was for damages for breach of contract. She alleged that in June, 1917, the defendants wrongfully repudiated their bargain with her. Hence she claimed damages under two distinct heads, namely, (*a*) damages for loss of salary, and (*b*) damages for the loss of publicity and advertisement arising from the refusal of the defendants to permit her to perform. No evidence was given at the trial that it was the mutual intent of the parties at the date of the contract that enhanced publicity and salary should follow from the plaintiff's appearances at the defendants' hall, and the plaintiff's agent, Mr. Bartley, who negotiated the contract, was not called as a witness. The jury found that the defendants had committed the breach of contract alleged. They assessed the damages under head (*a*) at the sum of 100*l.*, and under head (*b*) at the further sum of 100*l.* The defendants submitted that the latter head of damages was not recoverable in law. This point was ably argued before me by counsel representing the parties.

"The substantial facts upon which the plaintiff relied may be briefly stated. She is an experienced performer. She has toured in the United States with favourable results. She has had many successful provincial engagements. But the aim of all music-hall artistes is to secure a London reputation and to win the approval of

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London audiences. If these things be gained, then fame may quickly follow and a salary may be obtained far in excess of ordinary provincial remuneration.

"The Victoria Palace is a well-known London music-hall. It is regarded as a West End place of entertainment. The audiences are large and critical. The performer who secures their approbation has opened the gateway of London success, for to the Victoria Palace there go the managers of other London halls with the object of selecting those who succeed and offering them important and lucrative engagements. Hence the importance to the plaintiff of appearing at the Victoria Palace and hence her claim to the second branch of damages awarded by the jury. The facts I have stated will suffice for the purpose of considering the important point at issue."

The jury found that the defendants had committed a breach of the contract by refusing to allow the plaintiff to perform, and awarded her 100*l.* damages for loss of salary and 100*l.* damages for loss of publicity. On these findings the question whether the damages for loss of publicity were recoverable in law was reserved for further consideration.

J. B. Matthews K.C. and *E. F. Lever* for the plaintiff. The plaintiff is in law entitled to recover the 100*l.* awarded to her by the jury for loss of publicity: *Chaplin* v. *Hicks* (1); *Marcus* v. *Myers*. (2) The defendants must have known that to deprive the plaintiff of the opportunity of appearing in a West End place of entertainment would injure her professionally. It is no doubt possible to distinguish the facts in *Chaplin* v. *Hicks* (1) from those in the present case on the ground that in *Chaplin* v. *Hicks* (1) there was an express contract to give publicity, but in the circumstances of the present case a contract to give publicity must necessarily be implied. *Bunning* v. *Lyric Theatre* (3) is in favour of the plaintiff and is precisely in point.

McCall K.C. and *T. Scanlan* (for *Gilbert Beyfus*, serving with His Majesty's Forces) for the defendants. The question whether the defendants were under an obligation to give the plaintiff publicity

(1) [1911] 2 K. B. 786. (2) 11 Times L. R. 327.
(3) 71 L. T. 396.

must depend upon the terms of the contract. It is solely a contract to pay her a salary, and in the circumstances no undertaking by the defendants to give her publicity can be implied. A stipulation in a contract can only be implied where an implication necessarily arises that the parties must have intended that the suggested stipulation should exist: *Hamlyn & Co.* v. *Wood & Co.* (1) The decisions in cases where commission was payable to the employee do not apply, as none was payable in the present case. If damages for loss of publicity can be recovered there must be an express contract to give it or a contract necessarily implied. In actions on contracts many elements are excluded which may be taken into consideration in actions of tort: *Addis* v. *Gramophone Co.* (2) Damages merely for loss of publicity are inadmissible in the case of a contract for service. Otherwise a chauffeur to a Cabinet Minister would, if wrongfully dismissed, be able to recover heavy damages for loss of publicity in addition to those which he could alone have recovered had his employer been an ordinary private individual. The highest measure of damages recoverable by a servant for breach by the master of a contract of service is the loss of wages he has suffered less the wages he would have obtained from fresh employment if he had made efforts to obtain it. *Turner* v. *Sawdon & Co.* (3), a decision of the Court of Appeal, is conclusively in favour of the defendants. If an actress can recover damages for loss of publicity, other employees must have the same right. If the plaintiff had wished the defendants to be under a binding contract to employ her so as to give her publicity, she ought to have insisted on an express term to that effect being inserted in the contract. The contract is merely one to engage the plaintiff, not to employ her. A contract to employ can only be implied in very special circumstances. In *Bunning* v. *Lyric Theatre* (4) there was an express stipulation to advertise the plaintiff daily. [Mayne on Damages, 7th ed., pp. 10, 49, 244, 245; *Fechter* v. *Montgomery* (5); and *In re Rubel Bronze and Metal Co. and Vos* (6) were also referred to.]

Lever in reply. The question whether there was a contract by

(1) [1891] 2 Q. B. 488, 491.
(2) [1909] A. C. 488, 495.
(3) [1901] 2 K. B. 653.
(4) 71 L. T. 396.
(5) (1863) 33 Beav. 22.
(6) [1918] 1 K. B. 315.

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the defendants to give the plaintiff publicity is the same as whether they contracted to give her employment, for in the case of a theatrical artiste employment necessarily involves publicity. The introductory words of the contract and clauses 4, 10, 23, 26, 28, and 33 show that the right of the plaintiff to perform as well as to be paid a salary was in the contemplation of the parties. There was a duty upon the plaintiff to give performances and a duty upon the defendants to give her an opportunity of performing. Publicity is vital to an artiste. The Victoria Palace is a sort of vestibule to the West End music-halls. In a contract of this kind publicity is always in the contemplation of the parties. That the parties contemplated that the plaintiff should have the right to give her performances is clear from the right of the defendants reserved by the contract to vary smaller matters. [*Newman* v. *Gatti* (1) was also referred to.]

Cur. adv. vult.

June 28. The following judgment was read by

McCARDIE J., who, having stated the facts, continued: If the plaintiff be correct in her contention, a new and serious head of damages may be asserted in many future cases, for the contract between the present parties is one which is generally used in the music-hall profession. The considerations, moreover, which here arise cannot be confined to the class of agreement now before me. They are wide in scope and weighty in possible consequence. They touch many branches of contractual obligation. Hence I deem it well to consider the relevant authorities and to indicate the rules of law which affect the case; for the points raised in argument covered a wide field. In actions for breach of contract many elements are excluded which may be considered in actions of tort. Malice, ignominy, and aggravation are deemed irrelevant in litigation upon ordinary contracts. In exceptional cases only, as for example in actions for breach of promise of marriage or in actions against bankers for the dishonour of cheques, can such elements be regarded: see per Lord Atkinson in *Addis* v. *Gramophone Co.* (2) This rule was strikingly illustrated in that case, where it was held

(1) (1907) 24 Times L. R. 18. (2) [1909] A. C. 488, 495.

by the House of Lords that a servant wrongfully dismissed could recover no compensation for the gross manner of his dismissal or for his injured feelings, or for the loss which he might sustain from the fact that his dismissal of itself made it more difficult for him to obtain employment. Of the many other limitations on the right to recover damages for breach of contract I need only now refer to one for the purpose of this case, namely, to the much discussed decision that upon a breach of contract for the sale of goods a plaintiff cannot recover damages for injury to the general goodwill of his business: see per Bruce J. in *Bostock & Co.* v. *Nicholson & Sons*. (1) The ratio of this decision must be that such damages were outside the contemplation of the parties to the contract. This decision, however, which follows *Fitzgerald* v. *Leonard* (2), may be contrasted with the forcible judgment of Lord Coleridge J. in *Cointat* v. *Myham & Son* (3), reversed on another question in 1914. (4) But I point out that such cases as *Addis* v. *Gramophone Co.* (5) and *Cointat* v. *Myham & Son* (3) do not directly touch the question now before me, for they deal with damage alleged to be inflicted on existing reputation by a breach of a particular contract. They do not determine the somewhat different question which may arise where the plaintiff asserts that he is deprived of an accretion of future reputation through the defendant's non-fulfilment of a special bargain. The two questions are indeed interconnected on the issue of remoteness, but they may offer different considerations. It is well, I think, to here point out that the difficulty of assessing the loss of possible future reputation can afford no reason for refusing damages in respect of such loss if otherwise it be recoverable; for a jury must do its best, and acute difficulty of assessment does not preclude or impair a plaintiff's right to damages: see *Chaplin* v. *Hicks*. (6) Now I can see no reason at all in law to prevent a plaintiff, if the contract and circumstances be appropriate, from securing damages for the loss of advantageous publicity caused by a defendant's breach of contract. In *Bunning* v. *Lyric Theatre* (7) the defendants engaged the plaintiff as musical director of their

(1) [1904] 1 K. B. 725, 741.
(2) (1893) 32 L. R. Ir. 675.
(3) [1913] 2 K. B. 220.
(4) (1914) 110 L. T. 749; [1914] W. N. 46.
(5) [1909] A. C. 488.
(6) [1911] 2 K. B. 786.
(7) 71 L. T. 396.

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theatre and agreed expressly that his name should be announced as such director in certain daily newspapers and also upon their bills and programmes. The contract recited that Mr. Bunning had no experience in conducting a theatre orchestra in England and that he therefore agreed to give his services free of charge for a certain period. The defendants duly paid the plaintiff's salary and never dismissed him from their service, but they omitted to advertise him as musical director or to employ him as such. For this breach of contract the plaintiff sought damages upon the ground that the conduct of the defendants had deprived him of the professional reputation which he would have gained had the defendants fulfilled their bargain. He was awarded substantial damages by Stirling J. In *Marcus* v. *Myers* (1) the plaintiff, who was a ladies' tailor, recovered substantial damages from the defendants, who were the proprietors of the *Jewish Chronicle*, for breach of their contract to insert an advertisement in a particular place in their newspaper. It appears from the judgment of Kennedy J. that the theory of the plaintiff's claim was the loss of possible business through the non-insertion of the advertisement. But in my view this is merely an alternative way of stating that the damages arose through the loss of publicity, for the loss of business was a consequential result of the loss of publicity. The jury were directed by Kennedy J. in accordance with the rule established in *Hadley* v. *Baxendale*. (2) In my respectful opinion the decisions in *Bunning* v. *Lyric Theatre* (3) and *Marcus* v. *Myers* (1) are clearly sound in principle. Take, for example, the case where a young and gifted performer agrees to work for a famous impresario at a nominal salary and for a period of years on the express terms that the latter should advertise the former and should endeavour in all proper ways to secure his publicity and success. In such a case I deem it clear that substantial damages might be obtained if the impresario wrongfully repudiated his agreement with the artiste. If the law were otherwise, grave injustice might be inflicted, for loss of advertisement may involve a serious financial injury.

In presenting his argument on behalf of the plaintiff Mr. J. B. Matthews relied on *Bunning* v. *Lyric Theatre* (3) and *Marcus* v.

(1) 11 Times L. R. 327. (2) (1854) 9 Ex. 341.
(3) 71 L. T. 396.

Myers (1) as affording a substantial juristic basis for the second head of damages given by the jury. But, as pointed out by Mr. McCall and Mr. Scanlan for the defendants, in those cases the contracts were made for the direct purpose of securing publicity, and the advertisement provisions in each contract were clear and express. Indeed, advertisement was the sole object of the bargain in *Marcus* v. *Myers*. (1) Does the contract in the present case present any juristic similarity to the contracts considered in those decisions? This seems to me to be the vital question in the present case, for I conceive it clear that the point as to whether or no damages for loss of publicity can be recovered in any case depends primarily on the nature and true construction of the contract between the parties, and secondarily upon the special circumstances known to both parties at the time of the agreement. There can be, as I have said, no inherent reason why damages for loss of publicity should not in appropriate cases be recovered.

Now, in considering the answer to the above question it is essential to inquire whether the present contract imposes on the defendants any obligation to allow the plaintiff to appear at their music-hall on the dates fixed by the agreement. If no such obligation exists, then damages for loss of publicity cannot, I conceive, be recovered. I recognize that the point is a grave one. It affects in the most vital manner the interests of a great body of artistes and performers. The relevant decisions call, therefore, for careful survey. The leading authority is *Turner* v. *Sawdon & Co.* (2) There the defendants, who were in the cotton trade, agreed to "engage and employ" the plaintiff as their representative salesman for a period of years at a salary. Before the expiration of the period the defendants, although ready and willing to pay the salary, refused to give the plaintiff any work to do on their behalf. Thereupon the plaintiff brought his action to recover damages for breach of contract. But it was held by the Court of Appeal that there was no obligation on the defendants to provide the plaintiff with actual work. They accordingly entered judgment for the defendants in spite of the argument for the plaintiff that unless he received employment his hand would not be kept in practice and that he would therefore become inefficient as a salesman. As was said by A. L. Smith M.R., "it is within the

(1) 11 Times L. R. 327. (2) [1901] 2 K. B. 653, 657.

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province of the master to say that he will go on paying the wages, but that he is under no obligation to provide work."

This is a strong decision, for it was given in spite of the express words of the contract that the defendants would "engage and employ" the plaintiff. A judgment to the same effect had been delivered at an earlier date by Bigham J. in *Lagerwall* v. *Wilkinson & Co.* (1) in an action against certain manufacturers by a commercial traveller who alleged that the result of his actual non-employment as a traveller by the defendants was to injure his travelling connection. Bigham J. held that the only obligation on the defendants was to pay the agreed salary. In *Konski* v. *Peet* (2) Neville J. adopted and applied the principle of *Turner* v. *Sawdon & Co.* (3) The authorities just cited are seriously adverse to the present plaintiff unless a distinction exists between the employment of a public performer and the employment of an ordinary commercial agent. That the two classes of employment may well differ in their essential features was indicated by Sir John Romilly M.R. in the well-known case of *Fechter* v. *Montgomery.* (4) There the learned Master of the Rolls pointed out that the profession of an actor is peculiar in its character and results, and that his success entirely depends on pleasing the public and upon being constantly before them. He added that "It is obvious that you cannot put him in the position of a clerk or other person similarly situated and compare him with such a person." The actual decision, however, in *Fechter* v. *Montgomery* (4) is not directly relevant to the present case, for the question there at issue was as to the grant of an injunction against the actor who had performed elsewhere. The special contract, moreover, in *Fechter* v. *Montgomery* (4) was one which indicated Mr. Montgomery's serious pecuniary sacrifice, known to Mr. Fechter, for the purpose of securing an opportunity of appearing before London audiences. But *Fechter* v. *Montgomery* (4) is a useful authority as to the legitimate inclination of a judge in construing a contract between an actor or other public performer and a theatrical proprietor. I observe that in *Turner* v. *Sawdon & Co.* (5) Stirling L.J. referred with approval to

(1) (1899) 80 L. T. 55.
(2) [1915] 1 Ch. 530.
(3) [1901] 2 K. B. 653.
(4) 33 Beav. 22, 27.
(5) [1901] 2 K. B. 653, 659.

the views indicated in *Fechter* v. *Montgomery* (1), and I may venture to say that in the *Rubel Bronze Case* (2) I expressed my respectful appreciation of those observations by Stirling L.J. But the fact that a man is an actor, a public singer, or the like cannot affect the settled principles of construction which are applicable to every contract. It is an important circumstance to be considered in arriving at the meaning of the bargain, but it is no more than a circumstance. In every case where the question arises whether an employer is bound to provide actual employment the Court must apply the same rules of interpretation whether the employee be a traveller or a public singer, a clerk, or a music-hall artiste. Hence I turn to the terms of the contract in the present case. It is, as I have said, a form of contract which is very widely used. It is somewhat remarkable. The most striking feature of the document is the fact that of the thirty-nine clauses one only is in favour of the artiste, namely, the clause providing for the payment of salary. The other thirty-eight clauses are in substance in favour of the music-hall proprietor. In the course of their able arguments for the defendants Mr. McCall and Mr. Scanlan submitted that there is no clause whatever which can be said to place on the defendants any express obligation to allow the plaintiff to appear and perform, and that their only express obligation is to pay the agreed salary. An examination of the contract satisfies me that this contention is correct. If, then, there be no express obligation to allow the plaintiff to perform, it becomes necessary to consider whether there be any implied obligation to that effect; for if there be such an implied obligation it will follow that the legal result as to liability for damages is as if the obligation were express: see per Lord Tenterden C.J. in *Marzetti* v. *Williams*. (3) In considering whether this implied obligation here exists I am, of course, fully entitled to consider the vocation of the plaintiff and the characteristics and objects of her professional life. The Court will draw any implication which is necessary for the business efficacy of a contract: see *The Moorcock*. (4) Thus in *Turner* v. *Goldsmith* (5) the Court held that where a servant is paid

(1) 33 Beav. 22, 27.
(2) [1918] 1 K. B. 315, 324.
(3) (1830) 1 B. & Ad. 415, 423.
(4) (1889) 14 P. D. 64.
(5) [1891] 1 Q. B. 544.

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by commission a master is bound to give him an opportunity of earning the remuneration. So, too, in *Devonald* v. *Rosser & Sons* (1) the Court held that where a servant is paid by piecework there is an implied obligation on the master to provide the servant with a reasonable amount of work. But it is vital to remember the words of Lord Esher M.R. in *Hamlyn & Co.* v. *Wood & Co.* (2) He said: "I have for a long time understood the rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication." I conceive that *Turner* v. *Sawdon & Co.* (3) and *Lagerwall* v. *Wilkinson & Co.* (4) are striking illustrations of the rule so stated by Lord Esher M.R. In *Newman* v. *Gatti* (5), moreover, the Court of Appeal showed no willingness to extend the doctrine of an employer's implied obligation in favour of an "understudy" at the Vaudeville Theatre, London. Can I then in the present case hold that there was any implied obligation on the defendants to allow the plaintiff to give her performance? In the first place I must point out that if such was the intended obligation it would have been most easy to express it with clearness and cogency in the contract. In the next place I point out that the contract is a perfectly good business arrangement without any such implied obligation; for on the one hand the artiste gets a right to full salary even though she never performs, whilst on the other hand the employer has the right to call for such performances as he wishes. In the third place I think that the terms of the contract tend to negative rather than to support the implication asserted by the plaintiff; for there is nothing in the bargain which denotes that the parties have treated the alleged obligation as the basis of their agreement. On the contrary, the scheme of the agreement seems to be that everything shall be left to the control and discretion of the defendants. Clause 33, moreover, is of vital significance. It runs as follows: "The management shall have the sole right to deter-

(1) [1906] 2 K. B. 728.
(2) [1891] 2 Q. B. 488, 491.
(3) [1901] 2 K. B. 653.
(4) 80 L. T. 55.
(5) 24 Times L. R. 18.

mine the position of the artiste's name, the size and nature of the type, and the description of the turn on bills, programmes and advertisements." This wide and dominating discretion of the employers, even though subject to the legal requirement of honest fairness of decision, points clearly to the fact that it is for the defendants to determine the artistic standing of the plaintiff for the purposes of the defendants' hall and to decide upon the collateral points involved thereby. I need not indicate the resultant inferences which spring from the existence of this discretion.

Upon a careful consideration of the contract and the circumstances of the case I have arrived at the conclusion that there was no implied obligation on the defendants to permit the plaintiff to appear at their hall during the contract periods. I state this result with regret, and I trust that a new form of contract may be devised which will give a wider measure of protection to the legitimate interests of music-hall artistes. Provisions similar to those in *Bunning* v. *Lyric Theatre* (1) may well be inserted in many cases. It is obvious that the refusal of a manager to allow performances may inflict a great injury on the artiste. If, then, the defendants were under no express or implied obligation to allow the plaintiff to perform, it follows that the second head of damages cannot be supported in law.

In the course of the arguments reference was made to mutuality of object. It may well be that it was the hope of the plaintiff that enhanced publicity and salary would follow from her appearances at the defendants' hall; but no evidence whatever was given at the trial to prove that such was the mutual intent of the parties at the date of the contract. Moreover, the plaintiff's agent, Mr. Bartley, who negotiated the contract, was not even called as a witness at the trial. I am satisfied that the defendants made their contract upon no other basis than the business engagement of an artiste at the salary they agreed to pay. No element of publicity to the plaintiff entered into their part of the bargain. The defendants are a business company, and the Victoria Palace is after all a dividend-paying concern rather than a professed academy for the advancement of ambitious artistes. Under such circumstances loss of publicity must be treated, in view of the written contract, as too

(1) 71 L. T. 396.

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remote and outside the business contemplation of the parties. Such damage is not in the circumstances of the present case within the rules laid down in *Hadley* v. *Baxendale* (1), and is as remote as the damages for injury to goodwill claimed in *Bostock & Co.* v. *Nicholson & Sons* (2), the general damages for loss of trade claimed in *Watson* v. *Gray* (3), the loss alleged in *Addis* v. *Gramophone Co.* (4), and the injury asserted in *Lagerwall* v. *Wilkinson & Co.* (5) and *Turner* v. *Sawdon & Co.* (6) Thus the plaintiff's claim to the second head of damage fails. To allow it would involve a dangerous extension of the right to damages. The fame, whether social or commercial, of an employer does not of itself involve a corresponding liability on his part to pay a higher degree of damages. If the wages and period of service be the same, the servant of a Cabinet Minister will normally receive the same damages upon wrongful dismissal as the servant of a provincial bookmaker. The contract and the circumstances in the present case do not support a claim to extraordinary damages. In other contracts and under other circumstances substantial damages for loss of publicity may well be recoverable, but in this case the law cannot sanction their recovery.

I therefore give judgment for the plaintiff for 100*l.* damages only, that is, the amount awarded by the jury for loss of salary.

Judgment accordingly.

Solicitors for plaintiff: *Bevan & Co.*

Solicitors for defendants: *Beyfus & Beyfus.*

(1) 9 Ex. 341.
(2) [1904] 1 K. B. 725.
(3) (1900) 16 Times L. R. 308.
(4) [1909] A. C. 488.
(5) 80 L. T. 55.
(6) [1901] 2 K. B. 653.

J. E. A.

SAMUEL, APPELLANT *v.* COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

1918
June 26;
July 1.

Revenue—Super-tax—Calculation of Income—Shareholder in Company—Dividend "free of income tax"—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66.

In calculating for the purposes of the super-tax the income of a shareholder in a company which pays dividends on its shares "free of income tax," there must be added to the amount of a "tax free" dividend received by the shareholder the amount of the income tax paid by the company in respect of that dividend.

Ashton Gas Co. v. *Attorney-General* [1906] A. C. 10 applied.

CASE stated under the Finance (1909-10) Act, 1910, s. 72, sub-s. 6, and the Taxes Management Act, 1880, s. 59, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on May 2, 1916, for the purpose of hearing appeals, Sir Marcus Samuel, Baronet (hereinafter called the appellant), appealed against assessments to the super-tax made upon him for the years ended April 5, 1914, 1915, and 1916.

The point in dispute being entirely one of principle, at the request of the appellant no figures were mentioned in the statement of the case, it being agreed on both sides that, if the contention of the appellant were upheld by the Court, reductions to agreed figures would fall to be made in the super-tax assessments for each of the years involved. If, on the other hand, the contention of the respondents were upheld by the Court, it was agreed that the super-tax assessments as made were correct.

The appellant was a shareholder in the "Shell" Transport and Trading Company, Limited, which was registered on October 18, 1897. His holding consisted of preference shares of 10*l.* each fully paid and of ordinary shares of 1*l.* each fully paid.

The articles of association of the company provided, inter alia, as follows: "108. The company in general meeting may declare a dividend to be paid to the members according to their rights and

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interests in the profits, but no larger dividend shall be declared than is recommended by the board. 109. Subject to the rights of members entitled to shares issued upon special conditions, the profits of the company available for distribution shall be divisible among the members in proportion to the amount paid up, or credited as paid up on the shares held by them respectively. 110. When in the opinion of the board the position of the company permits, interim dividends may be paid to members on account of the dividend for the then current year."

The dividends on the preference shares of the company were paid "less income tax," but as regards the dividends on the ordinary shares the following resolution was passed by the directors of the company on June 7, 1898: "It was decided in the event of an interim dividend being declared to pay same 'free of income tax.'" As from that date, in accordance with resolutions of the directors for declaring payments of interim dividends and recommending payments of final dividends on the ordinary shares "free of income tax," confirmed by resolutions passed each year at the annual general meeting of the company, all dividends on the ordinary shares, both interim and otherwise, had been paid "free of income tax," which was charged at the rate of 1*s.* 2*d.* in the pound for the years 1911, 1912, and 1913, and at the rate of 1*s.* 8*d.* in the pound for the year 1914.

In pursuance of the said resolutions the appellant became entitled in each of the three years ended April 5, 1913, 1914, and 1915, to the amount of dividend applicable to his holding of ordinary shares in the company "free of income tax." At the foot of the portions of the dividend warrants retained by the shareholders was the following certificate, signed by the secretary of the company: "I hereby certify that income tax on the profits of the company, of which this dividend forms a part, will be duly paid to the proper officer for the receipt of taxes. By order of the directors."

In arriving at the super-tax assessments the Commissioners by whom the assessments were made computed, in accordance with their invariable practice, the portion of the income of the appellant derived from dividends received from the company "free of income tax" in the following manner:—

Assuming the amount of the "tax free" dividend to be 100*l.*,

and income tax at a uniform rate of 1*s.* 2*d.* to apply to the whole period in respect of which such dividend was paid, then,

	£		
Actual amount of dividend received "free of tax"	100	0	0
Add income tax at 1*s.* 2*d.*, i.e., 1*s.* 2*d.* for every 18*s.* 10*d.* = $\frac{14}{226}$ or $\frac{7}{113}$ of 100*l.* . =	6	3	10
Gross amount of dividend receivable .	106	3	10

In estimating total incomes for the purpose of exemption or abatement in cases where "tax free" dividends were involved a similar course to the above was adopted.

On behalf of the appellant it was not disputed that, in arriving at the appellant's liability to super-tax, as far as regards the dividends paid "less income tax" on the preference shares held by him, the gross dividends, i.e., the amounts prior to the deduction of the income tax thereon, were properly included in the computations of the super-tax liability, but it was contended that, as regards the dividends paid "free of income tax" on the ordinary shares, no addition should be made to the actual sums received in respect of income tax assumed by the Special Commissioners to have been deducted in arriving at the dividends declared.

It was also contended that when a company declared a dividend "free of tax" it, in effect, made a present to the shareholder of the amount of the tax, and that a voluntary payment of that kind could not be regarded as a portion of the income of the shareholder, either for income tax or super-tax purposes; that the sum paid as a dividend "free of tax" in fact included the tax and the amount paid as dividend; and that the real income of the appellant from the shares in question was the amount for which he could maintain an action against the company, and that in the present case only the dividend actually declared and paid to the appellant could legally be recovered from the company.

It was contended on behalf of the respondents, inter alia, that as a general rule income tax was deducted from gross dividends on payment under s. 54 of the Income Tax Act, 1842, and the amount of the tax so deducted was shown on the dividend warrants; and that in cases of dividends paid "free of tax" income tax was, in effect, deducted in arriving at the amount of the dividends, the only

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practical difference between dividends paid "less income tax" and "free of income tax" being that in the former case the amount of the gross dividend and the tax deducted therefrom was shown on the dividend warrants, and in the latter case only the net sum remaining after suffering its proportion of the income tax, the result in either case being the same.

The Commissioners were of opinion that the assessments under appeal were correctly made, and they confirmed them accordingly.

Sir Ernest Pollock K.C. (*Bremner* with him) for the appellant. By s. 66 of the Finance (1909-10) Act, 1910, for the purposes of the super-tax regard is to be had to the total income of the individual from all sources. The amount of the appellant's income from his ordinary shares in this company is the full amount of the dividend declared and paid, that is to say, a dividend free of income tax. Although in ascertaining the annual profits of the company the amount paid for income tax cannot be deducted, that is not the same thing as saying that the income tax payable in respect of the appellant's dividend forms part of the appellant's income. The shareholders are indemnified by the company against payment of income tax, but an indemnity cannot be treated as forming part of the shareholder's income. For these reasons *Attorney-General* v *Ashton Gas Co.* (1) and *Johnston* v. *Chestergate Hat Manufacturing Co.* (2) are distinguishable from the present case. [*Kinloch's Trustees* v. *Kinloch* (3) and *Hunter* v. *Rex* (4) were also referred to.]

Sir Gordon Hewart S.-G. (*T. H. Parr* with him) for the respondents. The amount of dividend receivable by a shareholder is the same whether the dividend is paid less tax or tax free. A dividend of 1*l.* less 5*s.* income tax is the same thing as a tax free dividend of 15*s.* It would be a grotesque position if, by the alteration of a word, the directors of a company could enable the shareholders to escape liability for super-tax. By s. 66, sub-s. 2, of the Act of 1910 the total income from all sources for the purposes of the super-tax is to be estimated in the same manner as the total income is estimated for the purposes of exemptions or abatements under the Income Tax Acts. Sect. 163 of the Income Tax Act, 1842, uses the words

(1) [1904] 2 Ch. 621; [1906] A. C. 10.
(2) [1915] 2 Ch. 338.
(3) (1880) 7 R. 596.
(4) [1904] A. C. 161.

"chargeable . . . . by way of deduction," but in s. 28 of the Income Tax Act, 1853, and in subsequent Finance Acts the words are "by deduction or otherwise." The words "or otherwise" apply to the present case, where, although the dividend may have been declared tax free, the shareholder in fact pays the income tax, for the company when paying the tax is acting as the agent of the shareholder: *Brooke* v. *Inland Revenue Commissioners.* (1)

[He was stopped.]

Sir Ernest Pollock K.C. in reply. The question in this case is not whether there has been a payment of income tax by the appellant "by deduction or otherwise," but whether there has been any payment at all by him.

Cur. adv. vult.

July 1. SANKEY J. read the following judgment:—The appellant appeals against assessments to the super-tax made upon him for the years ending April 5, 1914, 1915, and 1916. The point in dispute is entirely one of principle, and no figures were mentioned in the statement of the case. The question is what is the method of calculation to be made for super-tax purposes where dividends are paid free of income tax. It is easiest to illustrate the difference between the parties by taking a hypothetical figure as was done in the case. Assume, for the sake of argument, that the actual amount of dividend received, free of tax, is 100*l.* and the income tax is at 1*s.* 2*d.* in the pound. Has the taxpayer for the purposes of super-tax to return the amount of 100*l.*, or must he add the income tax which has been paid to the Government, namely, 6*l.* 3*s.* 10*d.*, and return 106*l.* 3*s.* 10*d.* as the amount received by him, for the purposes of calculating his super-tax? The latter method of calculation has been invariably adopted and the taxpayer has been taxed for super-tax on the 106*l.* 3*s.* 10*d.* The appellant now seeks to challenge this practice.

Super-tax is payable under s. 66 of the Finance (1909-10) Act, 1910, which provides that "In addition to the income tax charged at the rate of one shilling and twopence under this Act, there shall be charged, levied, and paid for the year beginning on the sixth day of April nineteen hundred and nine, in respect of the income of any individual, the total of which from all sources exceeds five thousand

(1) [1917] 1 K. B. 61, 70; [1918] 1 K. B. 257, 267.

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pounds, an additional duty of income tax (in this Act referred to as a super-tax) at the rate of sixpence for every pound of the amount by which the total income exceeds three thousand pounds." The figures have been altered in subsequent Acts. It is further provided by s. 54 of the Act of 1842 that a company shall pay income tax on behalf of its shareholders. The marginal note is: "Officers of corporations to prepare statements of profits and gains to be charged, estimated on the annual profits before dividend made." And it is provided that ". . . . all such other persons, and corporations, or companies, shall allow out of such dividends a proportionate deduction in respect of the duty so charged."

It was contended by the appellant that when a company declared a dividend free of tax it in effect made a present to the shareholder of the amount of the tax, and that that voluntary payment could not be regarded as a portion of the income of the shareholder either for income tax or super-tax purposes, and that the real income of the appellant from the shares in question was the amount for which he could maintain an action against the company, that is, the amount which was actually paid to him.

In my view this question is concluded by authority. In the case of *Attorney-General* v. *Ashton Gas Co.* (1) it was held that, where by the special Act of a gas company it was provided that the profits divisible in any year amongst the ordinary shareholders should not exceed a given rate, in calculating the rate of dividend income tax ought to be included. In that case the company paid dividends at 10 per cent. free of income tax, and Buckley J. in giving his judgment says (2): "The profits are not arrived at after deducting income tax. The income tax is part of the profits—namely, such part as the Revenue is entitled to take out of the profits." That was affirmed in the Court of Appeal (3) and in the House of Lords. (4) The principle was also followed by Sargant J. in *Johnston* v. *Chestergate Hat Manufacturing Co.* (5), where it was a question of remuneration of a manager by a percentage on net annual profits, and it was held that the manager was entitled to be paid his percentage on the net profits before deduction of the tax.

(1) [1904] 2 Ch. 621.
(2) [1904] 2 Ch. 624.
(3) [1904] 2 Ch. 626.
(4) [1906] A. C. 10.
(5) [1915] 2 Ch. 338.

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In the present case upon each of the dividend warrants sent to the appellant by order of the directors the secretary states: "I hereby certify that income tax on the profits of the company, of which this dividend forms a part, will be duly paid to the proper officer for the receipt of taxes." In my view a correct appreciation of the facts renders the argument for the appellant untenable. When a company declares a dividend out of the profits it has made the whole of those profits do not belong to the shareholders; part of them belongs to the Government for income tax.

I will call the amount which is to be distributed to the shareholders x and the amount which is paid to the Government y. Now the profits of the company are not x, the part divided amongst the shareholders, but x plus y, for the income tax is part of, and has been taken out of, the profits. Coming now to a distribution to an individual shareholder, the same reasoning applies. When a company has paid, say for the sake of argument, a sum of 100*l.* to a shareholder as dividend free of tax, it has also paid, assuming the rate of income tax to be 1*s.* 2*d.* in the pound, a further sum of 6*l.* 3*s.* 10*d.* to the Government. As far as the shareholder is concerned his share is really 106*l.* 3*s.* 10*d.*, and the company pays 100*l.* to him and 6*l.* 3*s.* 10*d.* to the Government as his agent and on his behalf: see the remarks of Swinfen Eady L.J. in *Brooke* v. *Inland Revenue Commissioners* (1), where he says: "Where the duty is paid by a company in respect of the gains and profits of its business it pays the income tax as agent for its shareholders"; and Scrutton L.J. says (2): "I am quite clear that a company in paying income tax at the source at any rate pays as agent of the shareholders."

For these reasons I think that the amount returnable for super-tax purposes in the case of dividends paid free of income tax is not the amount actually received, but that amount plus the income tax in respect of it, or, taking the hypothetical figures above given, 106*l.* 3*s.* 10*d.*, not 100*l.*

In the result the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Wallons & Co.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) [1918] 1 K. B. 267. (2) Ibid. 270.

C. A.
1918
July 25, 26.

[IN THE COURT OF APPEAL.]

C. A. STEWART & CO. *v.* PHS. VAN OMMEREN (LONDON), LIMITED.

[1916 S. 2388.]

Ship—Charterparty—Hire—Payment per Calendar Month in advance—Vessel off Hire during Part of Month—Repayment for Period when Vessel off Hire.

Clause 5 of a time charterparty provided that the charterers should pay as hire a certain sum "per calendar month, commencing from the time the steamer is placed at the disposal of charterers, and pro rata for any fractional part of a month . . . . until her re-delivery. . . . . That the payment of hire shall be made . . . . in cash . . . . monthly in advance." A further clause provided that in the event of loss of time from various specified causes preventing the working of the steamer and lasting more than twenty-four consecutive hours the hire should cease from the commencement of such loss of time until the steamer should be again in an efficient state to resume her service. The steamer having been placed at the charterers' disposal, one month's hire in advance was paid on November 7, 1915. On November 20, 1915, the vessel went off hire and was not again efficient until January 6, 1916:—

Held, that each payment of hire under clause 5 was a payment for the ensuing calendar month and not for the next thirty or thirty-one days on which the steamer should in fact be on hire; that there had consequently been a failure of consideration in respect of so much of the amount paid in advance on November 7, 1915, as represented hire from November 20 to December 7, 1915; and therefore that the charterers were entitled to recover the amount attributable to those days.

APPEAL from a decision of Bailhache J.

By a charterparty dated July 23, 1915, the defendants sub-chartered to the plaintiffs the steamship *Frixos* for six calendar months. Clause 5 of the charterparty provided as follows: "That the said charterers shall pay as hire for the said steamer 3472*l.* per calendar month, commencing from the time the steamer is placed at the disposal of charterers, and pro rata for any fractional part of a month (the days to be taken as fractions of a month of thirty days) until her re-delivery. . . . . That the payment of the hire shall be made as follows: In London in cash, without discount, monthly in advance. . . . ." Clause 12: "That in the event of loss of time from deficiency of men or owners' stores, breakdown of

machinery, or damage to hull or other accident preventing the working of the steamer, and lasting more than twenty-four consecutive hours, the hire shall cease from the commencement of such loss of time until she be again in an efficient state to resume her service. . . . ." Clause 18: "That should the steamer be lost or missing, the hire shall cease from the date when she was lost or last spoken, or, if not spoken, then from the date when last seen, and hire paid in advance and not earned shall be returned to the charterers." Clause 21: "That the owners have a lien upon all cargoes and all sub-freights for hire and general average contribution, and for all expenses and damages due under or for breach of this charter, and charterers to have a lien on the steamer for all moneys paid in advance and not earned."

The steamer was placed at the plaintiffs' disposal on August 7, 1915. (1) On November 7, 1915, the plaintiffs paid to the defendants one month's hire in advance up to December 7, 1915. On November 20, 1915, the vessel went off hire, it being necessary for the owners to put her in dry dock, and she was not again efficient until January 6, 1916. The plaintiffs said that there was a failure of consideration in respect of so much of the amount paid in advance as represented hire from November 20, 1915, till December 7, 1915; and they claimed to recover the proportion attributable to that period of the hire paid on November 7.

The defendants denied that there was any failure of consideration.

Bailhache J. gave judgment for the plaintiffs.

The defendants appealed.

Inskip K.C. and *A. Neilson* for the defendants. By clause 5 of the charterparty the payment of hire is a payment for the next thirty or thirty-one days on which the vessel is on hire; it is not a payment for the ensuing calendar month. Having regard to clause 18, which specifically provides for an event on the happening of which hire paid in advance and not earned is to be returned, it cannot have been intended that hire should be returned for days when the vessel is off hire. The hire unearned in respect of those

(1) The plaintiffs subsequently sub-chartered the vessel, and certain questions arose out of that contract, but these do not call for a report.

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days is, in effect, to be regarded as a payment pro tanto of the next amount of hire.

R. A. Wright K.C. and *Le Quesne* for the plaintiffs. Clause 5 contains a positive obligation on the charterers to pay a specific sum on a certain date in respect of the ensuing calendar month. If, therefore, during that month there are days when the vessel is off hire, there is a partial failure of consideration for the payment in advance, and the charterers can claim a return of so much of the amount paid as is attributable to those days. In *Tonnelier* v. *Smith* (1) it was said by the majority of the Court of Appeal (Lord Esher M.R. and Rigby L.J.) that the payments in advance were provisional only, and it was further pointed out that the clause of the charterparty in that case corresponding to clause 18 of this charter could not be construed as limiting repayments to the sole case of loss. Clause 21 makes this quite clear. [They also referred to *Wehner* v. *Dene Steam Shipping Co.* (2)]

Inskip K.C. replied.

BANKES L.J. In my opinion this appeal fails. The question turns upon the construction of clause 5 of the charterparty. Mr. Wright, for the plaintiffs, contends that by the charterparty payment is to be made of a fixed sum on a fixed date in each month in advance for the opportunity of using the ship for every day in that month, but upon the terms that in certain events, which are named, if the charterers are deprived of that opportunity for any of those days, the owners are liable to repay the amount attributable to those days. On the other hand, Mr. Inskip, for the defendants, contends that the payment is to be a fixed sum on a fixed date in advance, but that is a payment for the actual use of the ship on any thirty or thirty-one days as the case may be, in whatever months those days occur. This action is brought claiming the return of hire overpaid, that is, in respect of the days when the vessel was off hire. Mr. Inskip answers that there was in fact no overpayment, because although the hire was paid on November 7 for a full month down to December 7, and although during that month the vessel was off hire for a considerable number of days, yet by the terms of the contract the charterers were entitled, for the payment already

(1) (1897) 2 Com. Cas. 258. (2) [1905] 2 K. B. 92.

made, to use the ship for a corresponding number of days commencing on January 6 when she came on hire again. That contention is, in my opinion, not correct. The language used is plain. The contract is for the letting of the steamer for a period of about six calendar months from a time named. Hire is payable, not at the rate of so much per day, but it is a fixed sum per calendar month; there is then a provision, which would not be required if Mr. Inskip's argument is correct, for a pro rata payment for fractional parts of a month. I agree that neither of the authorities referred to in the course of the argument is directly in point, but in *Tonnelier* v. *Smith* (1) the inconvenience was pointed out that would result if a construction, substantially that which is now contended for by Mr. Inskip, were applied. In my opinion the plaintiffs were entitled as a matter of law to go to the defendants on January 6 with an amount representing a month's hire in respect of the month then commencing, and the defendants could not have refused it, although, if Mr. Inskip is right, they could have said that that amount was not yet due because there were several days in respect of which the plaintiffs were entitled to the use of the vessel for the hire paid in November. The plaintiffs would reply that they were under an obligation to pay on January 6, but that the defendants were bound to repay them a certain sum as representing the days in November when the vessel was off hire. That view is in my opinion correct. There having thus, in my view, been an overpayment of hire for November, the defendants are under an obligation to repay to the plaintiffs that amount, and the fact that the vessel came on hire again and was available in January does not affect the rights of the parties in this respect. The appeal will be dismissed.

SCRUTTON L.J. In this case the point is a simple one. The plaintiffs say to the defendants "We have paid you money the consideration for which has failed," and the question whether they are right or wrong depends upon the construction of a very common clause in a time charter as to which I am surprised to find that it has existed so long without its meaning having been considered by the Courts. By the charterparty the vessel is let for about six calendar months, and hire is to be paid per calendar month, each

(1) 2 Com. Cas. 258.

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payment to be made monthly in advance. The question now is whether when a payment is made in advance it is a payment for the ensuing calendar month or is a payment for the next thirty or thirty-one days on which the steamer may in fact be on hire, which thirty or thirty-one days may be spread over the next two or three months according as the vessel is or is not on hire. In my opinion the language of clause 5 makes it fairly clear that the payment is for the next calendar month, and not for the next thirty or thirty-one days on which the ship is on hire. If that is so, then, if during that calendar month the ship is off hire for a number of days, there is a failure of consideration for the payment, and the sum paid in respect of those days can be recovered by action. In practice this of course may be set off against the next month's hire, but that very convenient course of practice does not alter the legal rights of the parties when it becomes necessary to determine them. The view I have expressed is in accordance with that taken by the majority of the Court in *Tonnelier* v. *Smith*. (1) Lord Esher M.R. and Rigby L.J. there said that "at no time during the term of the charterparty could it be ascertained with certainty on one of the days fixed for monthly payments how much freight would actually be earned during the month," and they pointed out that the shipowners were not bound to accept the amount which the charterers estimated might be earned during the month, for "if the estimated amount turned out to be too little the owners might be driven to an action for recovery of the deficiency, instead of having the surer and simpler remedy of payment in advance, subject to a liability to account or enforcement of their lien." I agree that this appeal should be dismissed.

EVE J. I agree. Clause 5 of this charterparty provides for a specific payment for a specific period, and in my opinion the language is not open to the construction which Mr. Inskip has sought to put upon it.

Appeal dismissed.

Solicitors for plaintiffs: *Downing, Handcock, Middleton & Lewis.*
Solicitors for defendants: *William A. Crump & Son.*

(1) 2 Com. Cas. 258, 265, 266.

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1918
July 30.

FEUERHEERD *v.* LONDON GENERAL OMNIBUS COMPANY, LIMITED.

[1918 F. 186.]

Practice—Discovery—Inspection of Documents—Privilege—Statement by Plaintiff to Defendants' Representative.

In an action claiming damages for negligence the defendants by their affidavit of documents claimed privilege in respect of a certain statement which they said was obtained for the purpose of being laid before their solicitors for the defence of the action. The document in question was a joint statement made and signed by the plaintiff and her sister-in-law, both of whom, in making it, were under the impression that the person to whom they made it was the representative of the plaintiff's solicitor. In fact the person to whom they made the statement was the defendants' claims inspector, but the misapprehension in the minds of the plaintiff and her sister-in-law was not induced by any deceit on his part:—

Held, that the statement was privileged from discovery.

Tobakin v. *Dublin Southern Districts Tramways Co.* [1905] 2 I. R. 58 not followed.

APPEAL from Lush J. at chambers.

The plaintiff sued the defendants for damages sustained by her on December 30, 1917. She alleged that while she and her sister-in-law were in a taxicab an omnibus belonging to the defendants collided therewith owing to the negligence of the defendants' driver. The defendants admitted the fact of the collision, but said that it was caused by the negligence of the taxicab driver.

In their affidavit of documents the defendants said that they had in their possession certain documents which they objected to produce as being communications of a confidential character prepared in reference to the litigation which was anticipated and apprehended, and had since arisen in this action, and which communications were made for the purpose of being laid before their solicitors for the defence of the action. Among these documents was a "joint statement signed by plaintiff and Marietta Feuerheerd, dated January 7, 1918." The plaintiff took out a summons for an order requiring the defendants to produce this joint statement, and in support of the summons she filed an affidavit in which she stated that she had

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arranged to see her solicitors' representative at the rooms of her sister-in-law, Miss Feuerheerd, for the purpose of giving him her detailed statement in reference to the accident; that upon her arrival at the rooms she found her sister-in-law engaged in conversation with a gentleman who was taking down a statement from her as to the accident; that this gentleman then asked the plaintiff questions in reference to the accident and as to her injuries; that when he had concluded writing the statement he asked her and Miss Feuerheerd to sign it, which they did; that just before the end of the interview the name of the representative of the plaintiff's solicitors was announced, whereupon the gentleman who had taken down the statement hurriedly picked up his papers and left; that till then she had been under the impression that she had been speaking to her solicitors' representative. Miss Feuerheerd, who joined in the affidavit, stated that had she recognized in the first instance that the person calling upon her was the defendants' representative—he was, in fact, their claims inspector—she would not have made any statement to him. Both deponents stated that no prior intimation had been given by the defendants or their agents stating that it was their intention to send some one to see them or requesting them to make any statement in reference to the accident.

The Master made an order for the production of the joint statement, but on appeal Lush J. reversed this order, adding the following note: "I have come to the conclusion that I must follow the decision in *Southwark and Vauxhall Water Co.* v. *Quick* (1), and not feel myself bound by the decision in *Tobakin* v. *Dublin Southern Districts Tramways Co.* (2), as the judgments in the Court of Appeal in that case are not reported, and I cannot tell what the grounds of the judgment were. Moreover, the question was one of procedure only."

The plaintiff appealed.

Bernard Campion for the plaintiff. The statement is not privileged from production. Having been made under the belief that the person to whom it was made was the representative of the plaintiff's solicitors, the Court will refuse to hold it privileged. The plaintiff was in reality tricked into making and signing the state-

(1) (1878) 3 Q. B. D. 315, 320. (2) [1905] 2 I. R. 58.

ment. This is the first time it has been suggested that a plaintiff can be thus approached by the defendants and, being tricked into making a statement, met with a claim of privilege. For a statement to be privileged it must have been intended by the person making it for the benefit of the person to whom it is made or for his principal.

[BANKES L.J. referred to *Friend* v. *London, Chatham and Dover Ry. Co.* (1) and *Pacey* v. *London Tramways Co.* (2)]

In those cases the question arose in reference to reports by the defendants' medical officers as to their examination of the plaintiffs. Those reports recorded the observations made by the medical officers themselves. That is very different from a statement signed by a plaintiff who is under a complete misapprehension as to the identity of the person to whom it is made. Further, the plaintiff has as much interest in this statement as the defendants, and is therefore entitled to see it. This was the view taken by the Irish Court in *Tobakin* v. *Dublin Southern Districts Tramways Co.* (3), which is directly in point. There the document for which the defendants claimed privilege was a report drawn up by the defendants' agent, who, three days after the occurrence complained of in the action, called upon the plaintiff and took down his evidence in writing. The document was read over to the plaintiff, and he affixed his mark thereto. The Court held that the defendants were not entitled to exemption from discovery in respect of the document.

Brandon for the defendants was not called upon.

PICKFORD L.J. In this case an order is sought for the production of a document under somewhat unusual circumstances. There was a collision between a taxicab in which the plaintiff and her sister-in-law were and an omnibus belonging to the defendants. The plaintiff has now brought an action to recover damages for the injuries she sustained. Soon after the accident the defendants' claims inspector went to see the plaintiff and her sister-in-law. It so happened that they were expecting the representative of their own solicitors, and, as they state in their affidavit, they were under the impression that the claims inspector was their solicitors' representative, and they

(1) (1877) 2 Ex. D. 437. (2) (1876) 2 Ex. D. 440, n.
(3) [1905] 2 I. R. 58, 60, 61.

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made a statement to him and signed it. He took the statement to the defendants, and the question is whether they are bound to produce it. If it had been proved that the statement was obtained by any deceit on the part of the claims inspector, I should have no hesitation in saying that privilege could not have been claimed for it, because privilege cannot be claimed by employers for the fraud of their agent. But no deceit has been proved in this case, and we must deal with the case on that footing. It has been sworn on behalf of the defendants that the statement was obtained for the purpose of being laid before their solicitors for the defence of the anticipated action, and that affidavit is conclusive upon the point. That being so, is the plaintiff entitled to say that the document is one which must be disclosed ? It has been contended that a statement of this kind is privileged only if it was intended to be made by the person making it for the benefit of the principal of the person to whom it was made. I cannot accept that as the ground of the privilege. In Bray on Discovery (p. 406), under the heading " As to distinguishing between the Protection attaching to Materials for Evidence and the Doctrine of Professional Privilege," the learned author correctly states the principles underlying these questions, but I cannot find there or elsewhere anything suggesting that protection depends upon the intention of the person making a statement. The privilege is that of the litigant, and, whether it is sought on the ground that it is something communicated to his solicitor or as materials of his evidence, the privilege is quite independent of the intention of the person making the statement. Applying those principles to the present case, this statement is in my opinion clearly privileged from production. No doubt there is a decision of the Court of Appeal in Ireland in *Tobakin* v. *Dublin Southern Districts Tramways Co.* (1) which is opposed to that view. In that case a statement was made by the plaintiff at the request of the defendant company's inspector, and the Divisional Court held that it must be produced. Gibson J. said : " Are the defendants at liberty to say that they will not allow the plaintiff to see this document so signed, on the ground that it is a privileged communication which they got from him for the purposes of litigation ? Stated in that bald form the proposition is repugnant to common sense."

(1) [1905] 2 I. R. 58, 60, 61.

I cannot enter into a discussion of the question whether or not the proposition is to be considered as repugnant to common sense, for we are dealing with a matter which is to be determined by the rules of Court. Gibson J. then goes on: "Suppose they had a receipt signed by the plaintiff, alleged to be in settlement of the action for a certain sum: that would be a document which would have come into existence for the purpose of avoiding litigation. Could the defendants claim privilege for such a document?" With the greatest respect, there is no analogy between the two cases. In the case supposed the receipt is set up as a defence to the action and would have to be produced as a matter of course. Gibson J. then continued: "My view of the question is, that the plaintiff has got an interest in the paper as well as the defendants. He is to be bound by it; and if he is not to see it, he may be taken by surprise at the trial." Whether the plaintiff had an interest in the paper is not a matter which decides whether it comes within the rule as to privileged documents or not. The decision of the Irish Divisional Court was affirmed by the Court of Appeal, but there is no report of the reasons given by the latter Court, and I am therefore unable to ascertain upon what principles that Court acted. It may be that the rules as to privileged documents are not the same in Ireland as with us, but however that may be, we are not bound to follow a decision which appears to us to conflict with the rules as to privilege and the decisions thereon of our Courts. This appeal therefore fails.

BANKES L.J. I agree. Lush J. appended a note to his order to the effect that he must follow the decision in *Southwark and Vauxhall Water Co.* v. *Quick* (1) and that he did not feel himself bound by the decision of the Irish Court in *Tobakin* v. *Dublin Southern Districts Tramways Co.* (2) I think that Lush J. was right. It is pointed out quite clearly by Brett L.J. in *Southwark and Vauxhall Water Co.* v. *Quick* (1) that if a document has come into existence merely as the materials for the brief, or if at the time it is brought into existence its purpose is that it should be laid before the solicitor for his advice or consideration, it is a privileged document. In this case upon the affidavit sworn on behalf of the defendants,

(1) 3 Q. B. D. 315. (2) [1905] 2 I. R. 58.

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and, indeed, as must be admitted for the plaintiff, it is perfectly obvious that this document came into existence merely for the purpose of being laid before the defendants' solicitors for their advice or consideration. It is said, however, that that rule does not apply here because the plaintiff made the statement under a misapprehension—the misapprehension being that the plaintiff and her sister-in-law thought they were speaking to their own solicitors' representative, and not to a representative of the defendants. In my opinion that makes no difference, and it is immaterial for this purpose whether the person under the misapprehension was a mere witness or the actual or an intended plaintiff. The case would be quite different if the person making the statement was under a misapprehension wrongfully and improperly induced by the person to whom the statement was made. That, however, is not the case here, and, as I have said, the mere fact that the statement was made by the plaintiff under a misapprehension does not take the case out of the rule.

SCRUTTON L.J. As we are coming to a contrary conclusion to that arrived at by the Court of Appeal in Ireland, I desire to state my reasons for thinking that this appeal should be dismissed. A collision occurred between the defendants' omnibus and a taxicab in which the plaintiff and her sister-in-law were being driven. Shortly afterwards the defendants' claims inspector called upon the plaintiff and her sister-in-law to get information from them as to the circumstances in which the accident occurred. It so happened that the ladies were expecting a visit from their solicitors' representative, and when the defendants' claims inspector was shown in they were under the impression that he had come from their solicitors, and they answered the questions he put to them and then signed the statement which he took down. The question is whether that document is privileged from production now that the plaintiff has commenced an action against the defendants for injuries sustained in the accident. If the statement had been obtained by any misrepresentation on the part of the claims inspector, very different considerations would arise, but having read the ladies' affidavit carefully, and assuming that every relevant fact is stated therein, I am unable to find any evidence that their mistake was induced by

anything done by the claims inspector. That being so, there is merely a misapprehension by the plaintiff, not induced by anything in the nature of a trick. According to our rules of procedure, if a party to the proceedings swears that a document was obtained by his agent for the purpose of being submitted to his solicitor in view of anticipated or actual litigation, that statement is conclusive. Mr. Campion has, however, contended that it makes all the difference that the person making the statement for which privilege is claimed did not know that it was to be used for submission to the solicitor in the litigation. I am unable to understand how the attitude of the party from whom the information is derived affects the matter. The question is not what the party thought when he gave the information, but for what purpose the person who made the record for which privilege is claimed made it. It was also said that it made a difference if the statement was made by a party to the action. I do not agree. The principle was laid down in *Southwark and Vauxhall Water Co.* v. *Quick* (1), and the Irish case, *Tobakin* v. *Dublin Southern Districts Tramways Co.* (2), which decides the other way, is not very satisfactorily reported, as no reasons for the decision of the Court of Appeal are given. In the Divisional Court Gibson J., after stating the facts in that case, which are very similar to those in this except that the statement there in question was not made under any misapprehension, said: "Are the defendants at liberty to say that they will not allow the plaintiff to see this document so signed, on the ground that it is a privileged communication which they got from him for the purposes of litigation? Stated in that bald form the proposition is repugnant to common sense." It might be a desirable thing if all proceedings were governed by common sense, but as a matter of fact they are governed by the rules of Court as set out in the Annual Practice and the numerous authorities explaining them, and it is upon these rules and authorities that we have to consider this case. Gibson J. then continued: "Suppose they had a receipt signed by the plaintiff, alleged to be in settlement of the action for a certain sum: that would be a document which would have come into existence for the purpose of avoiding litigation. Could the defendants claim privilege for such a document?" Of course they could not, because in the case assumed the receipt was

(1) 3 Q. B. D. 315. (2) [1905] 2 I. R. 58, 60, 61.

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being set up as a defence to the action, and they could not do that and at the same time withhold it from the other side. Then Gibson J. proceeded: "My view of the question is, that the plaintiff has got an interest in the paper as well as the defendants. He is to be bound by it." I do not understand this. The agent makes a record on paper, and if the plaintiff did not sign it there would be no question that the plaintiff had no right to see it, and how the fact that he puts his signature to it gives him an interest in the paper I am unable to understand. Gibson J. adds: "If he is not to see it, he may be taken by surprise at the trial." The party will only be taken by surprise at the trial if his statement and his evidence do not agree. I am unable to agree with Gibson J.'s reasoning. It may be that the rules in Ireland on this matter are different from ours. If they are the same, the English authorities are quite contrary to the Irish decision, and we therefore cannot follow it. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *W. Norris & Co.*

Solicitors for defendants: *Joynson-Hicks, Hunt, Carden & McDonald.*

J. S. H.

COMMISSIONERS OF INLAND REVENUE *v.* DUKE OF NORTHUMBERLAND.

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July 2, 4.

Revenue—Excess Mineral Rights Duty—Method of Computation.

By the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 43, sub-s. 1, "Where the amount payable to any person as rent in respect of the right to work minerals . . . . varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty payable or paid . . . . by reference to the amount of the rent paid in that working year, by that person . . . . an amount equal to fifty per cent. of that excess."

Sub-s. 2: "The pre-war standard of rent shall, for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer . . . .

"The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year." The marginal note to the section is "Excess Mineral Rights Duty":—

Held, that in ascertaining the amount upon which excess mineral rights duty is to be paid under the section, it is permissible to deduct income tax from the amount payable as rent for the accounting year at the rate of tax paid in respect of that year; and also to deduct income tax from the amount which is to be taken to have been paid as rent in respect of the pre-war average year at the rate of tax in operation during that year.

Petition of Appeal by the Commissioners of Inland Revenue from the decision of a referee appointed under the Finance (1909-10) Act, 1910. By a lease dated February 7, 1916, the late Duke of Northumberland granted to the Throckley Coal Company, Limited, for the term of forty-two years and eight days from September 21, 1902, certain mines, seams, and beds of coal and fireclay under a large area of land therein described, and certain surface lands, together with the rights of working and wayleave as therein mentioned. The rents reserved by the lease were of several kinds, and included (1.) a certain rent of 800*l.* a year, merging in the tonnage rents; (2.) tonnage rents for coal, varying according to selling

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price; (3.) outstroke shaft and wayleave rents on the basis of tonnage worked or carried; (4.) a certain rent of 160*l.* for the use of a wagon way; (5.) surface wayleave and staith rent on the basis of tonnage carried and distance traversed; (6.) tonnage rents for fireclay, varying according to selling price; (7.) a fixed tonnage rent for fireclay manufactured on the demised land. The two certain rents of 800*l.* and 160*l.* were made payable half-yearly. All the other rents reserved were made payable on September 29 in each year.

The only rents material to the present case are (2.) and (6.), namely, those which varied with the selling price of coal and fireclay.

By the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 43, sub-s. 1, "Where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves . . . . varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty payable or paid, either directly or by deduction, by reference to the amount of the rent paid in that working year, by that person (in this section referred to as the person liable) an amount equal to fifty per cent. of that excess."

Sub-s. 2: "The pre-war standard of rent shall, for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer . . . .

"The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year."

Sub-s. 3: "Any amount payable in any accounting year by the lessee of minerals or wayleaves to a superior lessor as rent in respect of the minerals or wayleaves shall be treated as a deduction from the amount payable to the lessee as rent for that year, and in computing the pre-war rent values a corresponding deduction shall be made on account of any such rent."

Sub-s. 4: "Any increment value duty payable annually under section twenty-two of the Finance (1909-10) Act, 1910, shall, when paid, be treated as a deduction from the rent payable to any person in the year in which the duty is paid, and a corresponding deduction shall be made in computing the pre-war standard with which the rent for that year is to be compared." The marginal note to the section is "Excess Mineral Rights Duty."

Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 20, sub-s. 1: "There shall be charged, levied, and paid for the financial year ending the thirty-first day of March nineteen hundred and ten and every subsequent financial year on the rental value of all rights to work minerals and of all mineral wayleaves, a duty (in this Act referred to as a mineral rights duty) at the rate in each case of one shilling for every twenty shillings of that rental value."

For the accounting year ending September, 1916, the rent varying with the selling price payable to the Duke amounted to 9718*l.* 13*s.* 1*d.*, and the pre-war standard of rent at the rate of royalty based on the average price of the minerals in two of the three pre-war years was 6990*l.* 4*s.* 4*d.*, the difference being 2728*l.* 8*s.* 9*d.*

The sums of 9718*l.* 13*s.* 1*d.* and 6990*l.* 4*s.* 4*d.* were made up in the manner appearing from the following table:—

A. Rent payable under Sliding Scale in the Accounting Year.				B. Pre-War Standard of Rent.			
Nature and description of the Minerals. Coal and Fireclay: Throckley and Blucher Areas.				Rate of Royalty, based on the average price of the minerals in two of the three pre-war years.			
Coal:							
Blucher Pit, 136,796·3 tons @ 8·1*d.* per ton	£ 4616	*s.* 17	*d.* 6	Blucher Pit, 136,796·3 tons @ 5·7*d.* per ton	£ 3248	*s.* 18	*d.* 3
Throckley Pit, 200,674·85 tons @ 5·85*d.* per ton	4891	9	0	Throckley Pit, 200,674·85 tons @ 4·29*d.* per ton	3587	1	3
Fireclay, 6730·55 tons @ 7·5*d.* per ton	210	6	7	Fireclay, 6730·55 tons @ 5·5*d.* per ton	154	4	10
	9718	13	1		6990	4	4

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The question of principle for decision by the Court was whether (as the Commissioners contended) the excess mineral rights duty was imposed by s. 43, sub-s. 1, of the Finance (No. 2) Act, 1915, on the sum of 2728*l.* 8*s.* 9*d.*, or whether (as the respondent, the present Duke, contended) the actual income tax paid in respect of the accounting year (4*s.* in the pound), amounting to 1943*l.* 14*s.* 7*d.*, ought to be deducted from the 9718*l.* 13*s.* 1*d.*, leaving 7774*l.* 18*s.* 6*d.* as the net rent payable for that year, and the actual rate of income tax in operation for the pre-war average year at 1*s.* 2*d.* in the pound, amounting to 407*l.* 15*s.*, ought to be deducted from the 6990*l.* 4*s.* 4*d.*, leaving 6582*l.* 9*s.* 4*d.* as the pre-war standard of rent, in which case the excess mineral rights duty would be imposed on 1192*l.* 9*s.* 2*d.*, the difference between the 7774*l.* 18*s.* 6*d.* and the 6582*l.* 9*s.* 4*d.* The referee decided that income tax in the respective years, according to the respective rates of tax then in operation, must be deducted. His decision (so far as material) was as follows :—

"My decision is that in all cases of income arising from royalties varying according to the current market prices of minerals, where in order to arrive at an excess profit figure the tonnage of the accounting year is applied to the prices of the pre-war average year, the actual income tax per pound paid in respect of the pre-war year is the proper factor to be deducted from the amount so arrived at for the pre-war year, and that the actual income tax paid in respect of the accounting year is the proper factor to be applied to arrive at the figure of excess income for the said accounting year ;

"That the amount upon which the excess mineral rights duty charged against the appellant is fixed must be arrived at after a deduction for income tax in the respective years according to the respective rates of tax then in operation, whether payable or not."

From this decision the Commissioners appealed.

Sir Gordon Hewart S.-G. and *Sheldon* for the appellants. The referee was wrong in deciding that it was permissible to deduct income tax under s. 43 of the Finance (No. 2) Act, 1915. A subtraction sum arises under the section, the top figure of which is the amount payable in the accounting year, not the amount received. Sub-s. 2 provides the bottom figure of the subtraction sum. The words "payment of the rent in that year" refer to the pre-war rent.

The only deductions which may be made are those mentioned in sub-ss. 2 and 3. With regard to the mineral rights duty under s. 20 of the Finance (1909-10) Act, 1910, everything which is paid, including arrears, is taxed, but under s. 43 of the Act of 1915 excess mineral rights duty is only imposed on such part of the rent as varies with the price of the minerals. The intention of the Legislature was to tax the excess profits which the landlord gets through the rise in price caused by the war. For the bottom figure of the subtraction sum the tonnage of the accounting year is multiplied by the selling price of the pre-war year, i.e., the average of the two years mentioned in sub-s. 2, which may be called the notional year. That figure has to be deducted from the top figure, and the result is the profit which is due to the war. Nothing except that which the statute allows can be deducted from either figure without interfering with the balance. The lower figure is purely fictitious. It is the profit the landlord is assumed to be getting through the increase in price, caused by the war, which is taxed: *Murray* v. *Inland Revenue Commissioners*. (1) There may be cases (e.g., if the tonnage falls in the accounting year) where although the royalty payable to the landlord is less he will still have to pay on the taxable sum arrived at by these artificial means. There never was in fact any income tax payable on the particular notional sum which has to be taken for the pre-war year. For the purpose of the mineral rights duty under the Act of 1910 real figures are taken, not purely fictitious ones. Income tax cannot be deducted, because it is only payable on sums actually paid, not on purely fictitious sums. There is no separate income tax apportionable on rents which vary with the price of minerals. [Sub-ss. 5, 6, and 7 of s. 43 of the Act of 1915 were also referred to.]

Disturnal K.C. and *Micklethwait* for the respondent. The decision of the referee was right. The construction sought to be placed upon s. 43 of the Finance (No. 2) Act, 1915, by the appellants would, in many cases, be productive of great hardship. The meaning of the section is that the owner of the mineral rights is to be taxed, not upon something he does not receive, but fairly so far as is possible. The words of sub-s. 1 of s. 43 are not "where the amount of the rent mentioned in the lease" but "where the amount payable . . . . as rent." The "amount payable . . . . as rent" is the contractual

(1) [1918] A. C. 541.

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rent under the lease less the amount of income tax. Sect. 43 of the Act of 1915, which imposes the excess mineral rights duty, refers back to s. 20 of the Finance (1909-10) Act, 1910, which imposes the mineral rights duty, and under s. 20 of the Act of 1910 it was held in *Duke of Beaufort* v. *Inland Revenue Commissioners* (1) that the rental value upon which the mineral rights duty was payable was the contractual rent minus the current income tax for the year. Excess mineral rights duty is an addition to and of the same kind as mineral rights duty. In *Murray* v. *Inland Revenue Commissioners* (2) Viscount Haldane said: "The scheme of the excess mineral rights duty is this: A man pays on the difference between the total of what he receives in respect of royalties during the year of accounting and what he is taken by the Act to have received in respect of the pre-war standard year." The tax is therefore imposed on what the landlord actually receives. The word "payable" means the amount which a person is entitled to receive. It means "which may be paid." The landlord never receives any more than the contractual rent less the income tax. The word "payable" throws the risk upon the landlord of his rent not being paid. The question to be considered is what are the terms of the obligation as between the landlord and tenant and what is the amount payable under that obligation. It is immaterial whether it is paid or not. The landlord has to take the risk. As regards the pre-war year, a notional sum is being dealt with. It is not a sum actually received. Probably no income tax is deductible from that sum, but if it is, it can only be to the extent of the actual income tax for that year. Sect. 43 of the Act of 1915 is placed among a number of sections relating to "excess profits duty" which commence at s. 38 and end at s. 45, and the duty imposed by it is on excess profits, i.e., the excess profits a landlord makes on the tonnage rate. That is all that *Murray* v. *Inland Revenue Commissioners* (3) decided. Although less actual profit may be made where the tonnage is less, the coals remain in the bowels of the earth for another year. It would be unreasonable if the duty had to be paid on that portion of the profits of the mine which is intercepted by the Crown. Although *Duke of Beaufort* v. *Inland Revenue*

(1) [1913] 3 K. B. 48. (2) [1918] A. C. 541, 550.
(3) Ibid. 541.

Commissioners (1) was a decision upon the word "paid," it is in the respondent's favour. [*Denby* v. *Moore* (2), *Cumming* v. *Bedborough* (3), *Inland Revenue Commissioners* v. *Earl of Lonsdale's Settled Estates* (*Trustees of*) (4), *Hunter* v. *Rex* (5), the proviso to s. 21 of the Finance Act, 1917 (7 & 8 Geo. 5, c. 31), and Stroud's Judicial Dictionary, 2nd ed., vol. iii., heads "Payable" and "Rent Payable," were also referred to.]

Sheldon in reply. *Hancock & Co.* v. *Gillard* (6) shows that the rent "payable" means the contractual rent under the lease. The words "the amount payable as rent" were used in s. 43 of the Act of 1915 because what was being dealt with was that portion of the rent only which varies with the prices of the minerals. It is assumed that the landlord is reaping some benefit from the rise in prices due to the war, and that increase alone is taxable under the section. It was not intended that the part of the contractual rent deducted by the tenant for income tax should escape the excess mineral rights duty. If income tax is deducted it is not carrying out the object of the Act of 1915, namely, to compare like with like, i.e., the royalties in the accounting year, with those which would have been received in the pre-war years if the tonnage had been the same as in the accounting year and the only varying element was the price. The whole scheme is to tax merely the difference in royalty by reason of the difference in the price of coal.

The contention for the respondent is not consonant with the principle of the Income Tax Acts. The mining tenant has to pay income tax on his average profits for five years. (7) He pays the tax on the whole rent payable under his lease, including any arrears. The whole rent may be made up of tonnage rent, fixed rents, and cottage rents as well as rents varying with the prices. There is no income tax apportionable on the amount payable as rent varying with the prices. The amount payable as rent must therefore mean the contractual rent. If a part of the excess profit is deducted, that part escapes the duty. [*Dawes* v. *Thomas* (8) was also referred to.]

(1) [1913] 3 K. B. 48.
(2) (1817) 1 B. & Al. 123.
(3) (1846) 15 M. & W. 438.
(4) [1917] 2 K. B. 760.
(5) [1904] A. C. 161.
(6) [1907] 1 K. B. 47.
(7) See Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, Sched. (A.), No. III., second rule.
(8) [1892] 1 Q. B. 414.

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SANKEY J. This is a petition by the Commissioners of Inland Revenue whereby they appeal from a decision of a referee appointed under the Finance (1909-10) Act, 1910, for the purpose of assessing the excess mineral rights duty imposed by s. 43 of the Finance (No. 2) Act, 1915. The question between the parties, which is extremely short, but none the less difficult, is whether, in making the computation of the sum upon which excess mineral rights duty has to be paid, it is permissible to take into consideration and to make a deduction for income tax. The referee has decided that it is permissible, and from his decision the Commissioners of Inland Revenue appeal to this Court.

It was agreed that I have to decide the question of principle only, and that the parties will work out the resulting figures.

The excess mineral rights duty was imposed by s. 43 of the Finance (No. 2) Act, 1915. It is only to be applicable in the case of rents which vary according to the price of the mineral gotten.

Briefly putting it, the figure which shows the amount received for a working year ending after the beginning of the war (the accounting year) has to be ascertained and compared with the pre-war standard of rent, i.e., a notional figure representing the amounts which are to be taken to have been received before the war in the way defined by the Act, and, subtracting the notional figure from what may be described as the actual figure for the accounting year, the amount upon which the excess mineral rights duty is imposed is arrived at.

The scheme of the Act, as far as this section is concerned, is stated most concisely and most clearly in the speech of Viscount Haldane in *Murray* v. *Inland Revenue Commissioners*. (1) He said: "My Lords, the scheme of the excess mineral rights duty is this. A man pays on the difference between the total of what he receives in respect of royalties during the year of accounting and what he is taken by the Act to have received in respect of the pre-war standard year. But then by the introduction of the reference to pre-war value the matter is put upon an artificial basis. He pays, not upon the actual difference between royalties in one period and the receipts in a later period, but he pays upon a quite different basis, ascertained by reference to a royalty varying with price, because it is only in

(1) [1918] A. C. 541, 550.

the case of royalties varying with price that the section has any application. He pays, I say, upon the amount which he receives from these royalties in the year of accounting, minus so much as is arrived at by taking the same number of tons as had been raised in the year of accounting, and attributing to them a notional royalty corresponding to the figure which represents the pre-war average price."

Sect. 43 of the Finance (No. 2) Act, 1915, consists of seven sub-sections. Sub-s. 1 prescribes the method of arriving at the actual amount received during the accounting year. Sub-s. 2 prescribes the amount which is to be the pre-war standard—what I have called the notional figure; and the referee proceeded to ascertain both those amounts. Having taken into calculation the tonnage of the coal raised at the Blucher and Throckley pits and the fireclay raised at both those pits, he found that the rent payable under the sliding scale in the accounting year was 9718*l.* 13*s.* 1*d.*, and the notional rent—that is, the pre-war standard of rent—was 6990*l.* 4*s.* 4*d.*

The question which I have to decide is whether the referee was right in deciding that it is permissible to make a deduction for income tax from those amounts in order to arrive at the sum upon which excess mineral rights duty is to be paid. The deduction, if made, greatly affects the amount upon which the excess mineral rights duty is payable. The referee decided that income tax can be deducted in respect of the accounting year at the rate of 4*s.* in the pound and in respect of the notional year at the rate of 1*s.* 2*d.* in the pound. On behalf of the appellants it was contended, first, that s. 43 of the Finance (No. 2) Act, 1915, prescribes the code by means of which the duty is imposed and it states specifically the deductions which are permissible in order to arrive at the amount upon which excess mineral rights duty is payable. Sub-ss. 3 and 4 of s. 43 expressly prescribe particular deductions which can be made, and no other deductions except those specified in those sub-sections are prescribed. Therefore the deduction of income tax is not prescribed, and on behalf of the appellants it was contended that as income tax is not mentioned it is not permissible to deduct it.

The second contention for the appellants is that the deduction of income tax is not consonant with the scheme either of the excess mineral rights duty or with the Income Tax Acts, chiefly because the

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income tax in respect of mines is averaged over five years (1), and therefore it would be impossible to subtract from the amount of the rent received during the accounting year the particular amount of income tax which is properly attributable to it. In other words, that it would not be comparing like with like, because from year A's account income tax in respect of year B's account is being subtracted.

The contention on behalf of the respondent avoids both those difficulties, because it meets them upon the threshold and is in the nature of a preliminary objection to them. The contention was that on the proper construction of sub-s. 1 it must be held that the amount paid for income tax is to be brought into calculation on the ground that the words in the sub-section are not "where the rent payable to any person in respect of the right to work varies," but "where the amount payable to any person as rent varies according to the price of minerals," and that therefore the amount the respondent actually receives must be looked at. To take a hypothetical figure, let it be assumed that the amount of the rent reserved under the lease is 150*l.*, but that the tenant is entitled to deduct income tax at the rate of 6*s.* 8*d.* in the pound—not an extravagant supposition. Then the amount actually payable to the landlord is not 150*l.*, but 100*l.*, and that is the figure which it was contended on behalf of the respondent had to be taken at the outset for the purpose of making the calculation under sub-s. 1. If that contention is sound, it disposes of the first of the appellants' points, because if it can be shown in limine that income tax is deductible before any question of using sub-s. 3 or 4 arises the difficulty suggested by the appellants vanishes. My mind has fluctuated a good deal during the course of the argument, but I have arrived at the conclusion that the contention for the respondent upon that point is sound. The words of sub-s. 1 are not "where the rent payable to any person," but "where the amount payable as rent," and, reading those words in their natural signification, it appears to me that the interpretation given them upon behalf of the respondent is the correct one. On behalf of the appellants it was contended that the sub-section must have been drafted in that way in order to provide for

(1) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, Sched. (A.), No. III., second rule.

the case where there is a rent which is payable partly as a fixed rent and partly varies according to the price of the minerals, and that therefore the draftsman was unable to use the words "where the rent payable to any person in respect of the right to work the minerals varies according to the price," because that would exclude a case where a part of the rent was fixed and part varied. I do not think the words of the sub-section are apt for the purpose of dealing with a case of that kind. Appropriate words would have been "where the portion of rent payable to any person in respect of the right to work minerals varies according to the price of the minerals." It is extremely difficult to advance any very satisfactory reason upon this part of the argument, and I may perhaps excuse myself by reading the words of Lord Dunedin in *Murray* v. *Inland Revenue Commissioners*. (1) He said: "My Lords, in common with all who have had to interpret statutes, I have frequently experienced difficulties which more careful draftsmanship might have obviated. But I confess that the clauses which in this case your Lordships have to interpret do for blundering English surpass anything I have hitherto seen." If my decision should eventually be held to be wrong, I shall pray in aid that dictum of Lord Dunedin's as some excuse.

The second contention on behalf of the appellants was that the interpretation of the sub-section which I have adopted is not consonant with the scheme of the Income Tax Acts, because it involves the deduction from the income of one year income tax in respect of some other and different year. I see the difficulty, but there are many difficulties in the construction of this Act. Some income tax is deducted from each year, and the deduction for year A, whether it is income tax in respect of year B, C, or D preceding year A, is still a deduction of income tax which makes the amount payable in respect of year A as rent so much less. I therefore think that the argument with regard to the difficulty of reconciling the interpretation of the sub-section with the Income Tax Acts is not one of real weight.

Giving the best consideration I can to the matter, I think it is permissible to deduct income tax in computing the amount on which excess mineral rights duty is payable, and in the result I must uphold

(1) [1918] A. C. 541, 552.

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the decision of the referee. The principle laid down by him is right, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondent: *May, How & Chilver.*

J. E. A.

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Revenue—Super-tax—Deductions—Premiums on Policies of Life Assurance—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *ss.* 163, 164, 190, *Sched. G, r.* 17—*Finance* (1909-10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 66, *sub-s.* 2.

By the Income Tax Act, 1842, ss. 163, 164 and 190, Sched. G, r. 17, coupled with s. 66, sub-s. 2, of the Finance (1909-10) Act, 1910, a person liable to super-tax is, for the purposes of the tax, allowed to deduct from his income "every sum of annual interest or other annual payment reserved or charged thereon whereby the income shall or may be diminished."

The appellant effected certain policies of insurance on his life, and for the purpose of raising certain sums of money he by a series of deeds granted his life interest in certain estates and also assigned the policies to an assurance company by way of mortgage and further charge to secure sums advanced to him by the assurance company. He covenanted to pay (1.) interest on the sums advanced to him and (2.) the premiums on the life policies which he had taken out. In the case of the life policies he gave a right to the company to pay the premiums if he neglected to do so, and to charge them upon the mortgaged property:—

Held, per Sankey J. (following the decision of the majority of the Court in the Irish case of *Lord Massy* v. *Inland Revenue Commissioners* (1915) (unreported), but expressing agreement with the reasoning and the result arrived at in the dissenting judgment of Palles C.B. (post, p. 598, note)), that the premiums were annual payments reserved or charged on the appellant's income whereby it was or might be diminished within the meaning of ss. 164 and 190, Sched. G, r. 17, of the Act of 1842, and therefore in estimating his income for the purpose of super-tax the appellant was entitled to deduct them.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts under s. 72, sub-s. 6, of the Finance (1909-10) Act, 1910, and s. 59 of the Taxes Management Act, 1880.

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At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts for the purpose of hearing appeals the appellant, Earl Howe, appealed against an assessment to the super-tax in the sum of 27,466*l.* for the year ended April 5, 1917, made upon him under s. 66 of the Finance (1909-10) Act, 1910. The appellant claimed deductions from the assessment (which after a deduction of 815*l.* not disputed by the respondents amounted to 26,651*l.*) in respect of amounts paid by him as premiums on certain policies of insurance effected on his own life. The claim of deductions in respect of the premiums was resisted by the respondents, the Commissioners of Inland Revenue, and constituted the sole point upon which the opinion of the Court was sought.

The appellant, by a series of deeds commencing on July 5, 1902, granted his life interest in certain estates and also assigned certain policies of assurance effected by him on his own life with various insurance companies, and bearing dates respectively in or between the years 1884 and 1896, to the Guardian Fire and Life Assurance Company, Limited, by way of mortgage and further charge to secure sums advanced to him by the insurance company, each deed containing or incorporating a covenant to the effect that none of the said policies of assurance thereby mortgaged should become void or voidable, and that he would not do or suffer anything whereby the company might be prevented from receiving any of the moneys to become payable thereunder respectively, or any part thereof, and that if any of the policies had or should become voidable he would immediately thereupon at his own cost do all things necessary for restoring or keeping on foot the same, and that if any of the policies or any new policy or policies to be effected as thereinafter mentioned had or should become void he would immediately thereupon at his own cost effect, or enable the company to effect, a new policy or policies on his life in his or their name in such sum or sums as would have been payable under the policy or policies which should have become void if he had died, and that every such substituted policy and the moneys to become payable thereunder should be subject to that security and the power of sale and other powers, trusts, and provisions contained in or incident to those presents in relation to the said original policies and the moneys to become

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payable thereunder, and further that he would during the continuance of that security duly and punctually pay the annual premiums and other sums of money (if any) necessary for keeping on foot the said original policies and any substituted policy or policies when the same should have become due or within one week thereafter, and would forthwith deliver the receipt for every such payment to the company, and that if he should at any time neglect or refuse to make the payments aforesaid or any of them it should be lawful for the company to pay the same, and that all moneys and expenses which should be paid or incurred by the company in keeping on foot the said original policies or any of them, or in effecting or keeping on foot any such substituted policy or policies as aforesaid, or otherwise with relation to the premises, with interest for the same at the rate of 5 per cent. per annum for the time or respective times of the same having been paid or expended, should be repaid to the company by the appellant on demand, and until repayment should be charged upon the premises thereby mortgaged.

The appellant, in consideration of sums advanced to him by the said insurance company and under the powers conferred upon him by an indenture of settlement dated May 31, 1883 (the principal indenture), had jointly with his father, the late Earl, appointed by an indenture of mortgage dated March 1, 1894, certain estates from and after the death of the late Earl to the use of the said insurance company by way of mortgage, and upon the execution of the mortgage it was agreed that the present Earl (then Viscount Curzon) should assign to the said insurance company certain other policies of insurance effected by the appellant on his own life with various insurance companies and bearing dates respectively in or between the years 1883 and 1891; and in the assignment there was contained a covenant by the then Viscount that he would not by any act or omission cause or allow any policy thereby assigned, or any policy substituted therefor as thereinafter provided, to become void or voidable and would [then followed covenants similar to those contained in the series of deeds commencing on July 5, 1902, and set out above.]

The late Earl died on September 25, 1900.

The appellant had always paid the interest on the sums advanced by the insurance company as mentioned above, and in computing

the said assessment to super-tax for the year ending April 5, 1917, due allowance had been made for that interest.

At the hearing of the appeal it was contended for the appellant :—

(1.) That, the payments of the premiums being annual, and being payments which the appellant under the covenants contained in the several deeds had covenanted to pay, were "annual payments" within the meaning of s. 164 of the Income Tax Act, 1842, and within r. 17 of Sched. G, s. 190, of that Act. (1) Those sections are made applicable to super-tax by s. 66, sub-s. 2, of the Finance (1909-10) Act, 1910 ;

(2.) That for the purposes of super-tax the income to be estimated was the true and real income of the taxpayer after deducting annual interest or other annual payments reserved or charged thereon ;

(3.) That there was no distinction in principle between the annual premiums payable and paid by the appellant and the annual mortgage interest, which admittedly was properly deducted ;

(4.) That the appellant had covenanted to pay the annual premiums, and his income was charged with the payment of them, and that s. 36, sub-s. 1, of the Finance Act, 1916, had no application ; and

(5.) That the principle stated by Lord Davey in *London County Council* v. *Attorney-General* (2) was applicable, namely, "It was, no doubt, considered that the real income of an owner of incumbered property, or of property charged, say, with an annuity under a will, is the annual income of the property less the interest on the incumbrance or the annuity."

It was contended on behalf of the respondents (inter alia) :—

(1.) That the payments of premiums arose and were made solely under the contracts or policies with the insurance companies, and that as between the appellant and such companies those payments were not annual payments reserved or charged on the appellant's income within s. 164 ;

(2.) That the words "other annual payments" in the sections mentioned above were ejusdem generis with the preceding words and referred only to payments which were of a like nature with annual interest, and from which the payer had a legal right to enforce,

(1) See note (1), post, p. 597. (2) [1901] A. C. 26, 42.

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and the receiver was legally bound to allow, deduction of income tax, and that premiums on a policy of life assurance were of an essentially different character;

(3.) That the claim was, in effect, a claim to deduct life insurance premiums, which, as such, would be prohibited by s. 36, sub-s. 1, of the Finance Act, 1916.

The Special Commissioners were of opinion that in computing the total income of an individual from all sources for the purposes of exemption or abatement under the Income Tax Acts, and therefore pursuant to s. 66, sub-s. 2, of the Finance (1909-10) Act, 1910, for the purposes of super-tax, such annual payments only could be deducted as were reserved or charged on income, and operated wholly and exclusively by way of diminution of income, and that payments of premiums on policies of life assurance were not such annual payments, as they were in fact allocations of income to the formation of a capital fund. They therefore refused to make the deductions claimed by the appellant.

Tomlin K.C., *Hon. W. Finlay K.C.*, and *A. M. Bremner* for the appellant. The question is whether the appellant, in arriving at the amount for which he is assessable to super-tax, is entitled to deduct all annual payments which are charged on his income within the meaning of s. 164 of the Income Tax Act, 1842, including the premiums on the policies, or whether, as the respondents allege, he is merely entitled to deduct some of these payments, e.g., interest on the mortgages. The premiums, no less than interest, are annual payments charged on the mortgaged property. The super-tax was imposed by s. 66 of the Finance (1909-10) Act, 1910, and the total income is to be ascertained in the same manner as that of a person claiming exemption or abatement under the Income Tax Acts. By clause (*b*) of s. 66, sub-s. 2, of the Act of 1910 premiums in respect of which relief from income tax may be allowed under s. 54 of the Income Tax Act, 1853, were allowed to be deducted, but by s. 36, sub-s. 1, of the Finance Act, 1916, that deduction was disallowed for the purposes of the super-tax. The appellant is not, however, claiming the deduction upon the ground that he has paid life insurance premiums, but because the premiums are annual payments charged on his income whereby his income is diminished

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within the meaning of s. 164 of the Income Tax Act, 1842. If the premiums were not charged on his income, the deductions would be disallowed by the express provisions of s. 36, sub-s. 1, of the Act of 1916. By the mortgages they are in equity charged on the property. Sect. 163 of the Income Tax Act, 1842, enacts that a person claiming exemption must show what his total income is in the manner indicated in s. 164, and s. 66 of the Finance (1909-10) Act, 1910, enacts that for the purposes of the super-tax a person's total income is to be ascertained in the same manner. The result is that the appellant is entitled to deduct any annual sum charged on his property whereby his income shall or may be diminished. It is a mere accident that the particular payment in the present case is a life insurance premium. The income of a claimant of exemption is ascertained according to the directions contained in s. 190 of the Income Tax Act, 1842, Sched. G, r. 17, second and third heads. As the premiums are charged on his income, they become an aliquot part of it in the same way as the mortgage interest which he has to pay. As the appellant has appropriated the premiums which are a part of his income to the insurance companies, he is entitled to deduct them from his income, because the object of the legislation is to arrive at his real income. The mortgages charge the premiums upon the mortgaged premises in the ordinary form. The difference in form between the charge of the premiums and that of the interest is that the premiums are payable to the insurance companies, the interest to the mortgagees; but the effect is the same so far as the charge is concerned, because the mortgagees can claim to have all the premiums paid out of the mortgaged property. The premiums rest upon the security equally with the interest. In each case they are charged upon the property. How far, as against the insurance companies, income tax is chargeable on the premiums is totally distinct from the question whether the appellant is entitled to deduct them for the purposes of the super-tax. *Attorney-General* v. *London County Council* (1) shows that what has to be ascertained is the income which an incumbered owner really receives after he has paid the annual charges in respect of that income. The super-tax is upon that income which a person has, not upon that which he has not. Although an annuity represents the capital with which it is

(1) [1907] A. C. 131.

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purchased, it is clear from ss. 164 and 190, Sched. G, r. 17, of the Income Tax Act, 1842, that it may be deducted if it is charged upon property, and a policy in consideration of premiums is only the reverse case. In the one case a person buys an annuity for his capital, and in the other he buys capital for an annuity. There is no distinction in principle between them. *Taylor* v. *Evans* (1) and *Foley* v. *Fletcher* (2) are decisions upon s. 102 of the Income Tax Act, 1842, and are not relevant to the present case. In *Foley* v. *Fletcher* (2) there was no annual payment. In *Taylor* v. *Evans* (1) it was recognised that there might be an annual payment in respect of which the right of the payer to deduct tax did not arise. Sect. 54 of the Income Tax Act, 1853, shows that the purchase-money of a future benefit, namely, the sum which a person is liable to have deducted from his stipend or salary for the purpose of provision for his children after his death, can be deducted, and the section in terms describes it as the payment of an annual sum. There is no distinction between that annual payment and the payment of an annual premium to a life insurance company for precisely the same purpose. If a reversion were purchased by the grant of an annuity for a fixed number of years charged upon his property, the purchaser admittedly could deduct the annuity although it may represent the whole of his capital. The annuity is in precisely the same position as the premiums on the policy of life assurance. Both are in fact money paid by which at a future date a capital sum becomes the property of the purchaser. Sect. 102 of the Income Tax Act, 1842, deals with the question whether income tax is deductible by a payer before he makes the payment. That question is totally irrelevant to the one in the present case, namely, whether the payment of an insurance premium is one which the payer may deduct in arriving at his income for the purposes of the super-tax. If a person paid for a policy by the payment of a lump sum raised by way of mortgage instead of paying annual premiums he would admittedly be entitled to deduct the interest he had to pay on the mortgage, and yet he would be entering by other means into a transaction of the same nature as those into which the appellant in the present case has entered. Sect. 164 of the Income Tax Act, 1842, must be read in its natural and primary sense of including all

(1) (1856) 1 H. & N. 101. (2) (1858) 3 H. & N. 769.

annual payments charged upon income, and not in a restricted sense which would be unreasonable.

Sir Gordon Hewart S.G. and *T. H. Parr* for the respondents. The premiums are allocations of income to the formation of a capital fund. They are not annual payments within the meaning of s. 164 and s. 190, Sched. G, r. 17, of the Income Tax Act, 1842. The fact that by the mortgage deeds the appellant has covenanted to keep up the payments does not alter their intrinsic character. The real nature of the payments has to be looked at: *Secretary of State in Council of India* v. *Scoble.* (1) The appellant commenced to make the payments long before the mortgages were made, and the subsequent mortgage of the policies with a covenant to pay the premiums does not alter the character of the payments, which are payments of premiums upon policies of insurance and nothing else. Nor does the right of the insurance companies to pay them if the appellant makes default alter their character. If the mortgage deeds altered their character a taxpayer, by making a settlement of policies with a covenant to pay the insurance premiums, could always evade s. 36, sub-s. 1, of the Finance Act, 1916, which enacts that relief as regards insurance premiums shall not be given for the purposes of the super-tax. Although the settlement is made, the premiums still lack the quality of being payments from which income tax can be deducted by the payer. An annual payment in order to satisfy s. 164 and s. 190, Sched. G, r. 17, of the Income Tax Act, 1842, must be one from which income tax can be deducted by the payer. There is no right under the Income Tax Acts to deduct income tax upon payment of the premiums. The scheme of the Income Tax Act, 1842, is to collect the tax from the person who is most accessible whether he be the true owner of each part of the income or not. So far as his return is concerned he is not allowed to make any deduction in respect of annual interest, annuities, or other annual payments he has to make, but when he makes the annual payment he is allowed to pass on to the payee the burden of his proportionate part of the tax. It is only in respect of that kind of payment that a deduction is allowed under s. 164 of the Income Tax Act, 1842. The premiums do not satisfy that test, the reason being that the insurance company is not liable to pay income tax

(1) [1903] A. C. 299.

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upon the premiums, but upon the balance of its profits, although the premiums are an important element in arriving at the profits. The subject-matter of s. 164 is the mode of claiming exemption. The effect of that section and s. 190, Sched. G, r. 17, second and third cases, is to exclude the deduction of sums the deduction of which from the return of income is prohibited in the earlier assessing sections, which impose the tax at the source in full, and pass on to the ultimate recipient of that portion of the income which belongs to him the burden of the tax in respect of that portion by means of the deduction of the tax from it. The premiums do not fall within that scheme. The payer of interest is allowed to deduct the tax by s. 190, Sched. G, r. 10. It is distinguishable from the premiums in two respects—first, that when paid it is taxable as income in the hands of the person who receives it, and, secondly, that the person who pays it is entitled to deduct the income tax. A premium is not, viewed merely as a premium, taxable income in the hands of the insurance company; it is a trade receipt which goes to make up the taxable income of the insurance company. The scheme of the Income Tax Acts is that the Inland Revenue authorities assess income at the source without any deductions, but the tax so assessed in full at the source is passed on by deduction when part of the income so assessed belongs to another person. This appears from s. 60, Sched. A, No. 4, r. 10, of the Income Tax Act, 1842, which was held in *London County Council* v. *Attorney-General* (1) to include mortgage interest. That view is confirmed by r. 3 and Scheds. C and D, coupled with Sched. D of the Income Tax Act, 1853 (16 & 17 Vict. c. 34). In the case of annuities, yearly interest of money, or other annual payments, the assessment is made by s. 102, and it is directly upon the recipient if the sum is not payable out of income already taxed, that is to say, out of profits or gains brought into charge. Sect. 159 of the Act of 1842 bears out the same view. The result of an analysis of the various sections and rules bearing upon the subject in the Income Tax Acts is that the words "annual payment" in s. 164 of the Income Tax Act, 1842, must be restricted to a payment from which the tax can be deducted. Sects. 102, 103, and 104 of the Income Tax Act, 1842, s. 40 of the Income Tax Act, 1853, and s. 24, sub-s. 3,

(1) [1901] A. C. 26.

of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), confirm that view. The arguments upon which the respondents desire to rely are largely set out and clearly expressed in the judgment of Palles C.B. in the Irish case of *Lord Massy* v. *Inland Revenue Commissioners.* (1) In the present case, although some of the policies are charged contingently others are not charged at all. But it is not enough for the appellant to show that the payment of the premiums is reserved or charged within the meaning of s. 164 of the Act of 1842. He must also establish that payments of the premiums are annual payments within the meaning of that section and s. 190, Sched. G, and especially that they exhibit the cardinal feature of payments of such a kind that the person making them is entitled to deduct the income tax upon them. Unless they exhibit that feature, the question whether they are reserved or charged is merely of academic interest.

Tomlin K.C. in reply. In *Lord Massy* v. *Inland Revenue Commissioners* (1) Kenny J. and Madden J. held that the same contention as that relied on on behalf of the appellant in the present case must prevail, so that the decision of the majority of the Court is in favour of the appellant. The practice of the English Courts is where the exact point has been decided in another part of the United Kingdom upon the construction of a statute which extends to that portion of the United Kingdom to follow the decision in order to secure uniformity: per Horridge J. in *Brooks* v. *Inland Revenue Commissioners* (2); see also per Lord M'Laren in *Wilson* v. *Inland Revenue Commissioners.* (3) The judgment of Lord Macnaghten in *Attorney-General* v. *London County Council* (4) shows that the super-tax is imposed upon the income which a person has. The true test is whether the figure upon which a person's income is taxed represents income which he is free to apply as he chooses. In the present case the appellant is not free to apply premiums as he chooses. He must pay them to the insurance companies, and so far as he is concerned they might be struck out as being no part of his income. The premiums satisfy the three conditions contained in s. 164 of the Income Tax Act, 1842, for (1.) they

(1) (1915) Unreported. See note (2), post, p. 598.
(2) [1913] 3 K. B. 398, 406.
(3) (1895) 23 R. 18, 24, 25.
(4) [1907] A. C. 131.

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are annual payments, (2.) charged, (3.) whereby the appellant's income is diminished.

Cur. adv. vult.

July 9. The following judgment was read by

SANKEY J. This is a case stated under s. 72, sub-s. 6, of the Finance (1909-10) Act, 1910, and s. 59 of the Taxes Management Act, 1880, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of this Court, and raises a point as to the method of calculation of income for super-tax purposes.

The appellant, Earl Howe, was assessed for the super-tax in a considerable sum of money, but claimed a deduction therefrom in respect of amounts paid by him as premiums on policies of assurance effected on his own life, under the circumstances hereinafter set out. For the purpose of raising certain sums of money the Earl by a series of deeds granted his life interest in certain estates and also assigned certain policies of assurance effected by him on his own life to an assurance company by way of mortgage. He covenanted to pay (1.) interest on the sums advanced to him, and (2.) the premiums on the life policies which he had taken out, and in respect of the life policies he gave a right to the company to pay the premiums if he himself neglected to do so and to charge the same upon the mortgaged property.

For the purpose of calculating the super-tax the respondents admit that the appellant is entitled to deduct the sums paid as interest on the mortgages, but they deny that he is entitled to deduct the sums paid as premiums on the life policies. The Special Commissioners have decided in favour of the respondents, namely, that the appellant is not entitled to deduct the premiums paid for life insurance, and from their determination the present appeal is brought.

The argument for the appellant rests upon two sections of the Income Tax Act, 1842, namely, s. 164 and s. 190, Sched. G, r. 17. Sect. 164 is one of a bundle of sections from 163 to 170 relating to claims for exemption, and it provides that every person claiming to be entitled to exemption shall deliver particulars of every sum of annual interest or other annual payment reserved or charged thereon whereby the income shall or may be diminished, and the contention of the appellant is that the payments of life premiums come within

those words and satisfy each of them, namely, that they are annual payments reserved or charged upon the income whereby the income is or may be diminished.

The appellant asks me to give to those words their primary and natural meaning and to say that he is entitled to the deduction. He further says that there is no distinction in law between the payment of interest on the mortgages and the payment of premiums on the policies of assurance. The contention of the respondents is that it is not possible to pick out one section of these very complicated Acts and to say that that section has a particular meaning, without regarding the other sections of the Acts. The respondents contend that if various sections of the Income Tax Acts are examined the words above referred to have a technical meaning and not the meaning which at first sight one would be disposed to place upon them. They say that the scheme of the Income Tax Acts is to tax all sorts of properties and to tax them at the source, but by the machinery of the Acts certain persons who have to pay income tax may pass the liability on—for example, rent is liable to income tax, and a tenant who pays rent has to pay the income tax, but he can deduct the amount thereof from the next payment of rent; and it is argued that by reason of a number of sections the words "annual payment reserved or charged thereon whereby the income shall or may be diminished" only refer to payments from which the person making them is entitled to deduct income tax.

If the matter came to me unembarrassed by authority I am bound to say that a careful consideration of these sections would lead me to the conclusion that the contention of the respondents is correct. The matter, however, has recently come before the Irish Court in *Inland Revenue Commissioners* v. *Lord Massy* (1), and a report thereof was furnished to me by the Solicitor-General. That case had a somewhat curious history. It came before Kenny J., Madden J., and Palles C.B., and the two former judges decided that the contention as advanced in the present case by the appellant is correct. Palles C.B. on the other hand considered that the Crown was entitled to succeed. (1) By a majority of two to one, therefore, the subject succeeded, and an appeal was brought to the Court of Appeal. It was apparently argued for a great number of days

(1) Unreported. See note (2), post, p. 598.

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and then stood over for further argument, and there are indications during the interlocutory observations that the Irish Court of Appeal had not in any way made up its mind. Unfortunately during the interval between argument and re-argument Lord Massy died and his executors did not continue the case.

In the result I have a decision of the Irish Court in which this point has been decided in favour of the appellant by two judges out of three. If I may say so, with the greatest possible respect for the learned judges who formed the majority, I agree with the reasoning and the result arrived at by the Chief Baron, who was in the minority, but my attention was directed to the remarks of Swinfen Eady J. in *In re Hartland.* (1) That was a case in which one of the provisions of the Finance Act, 1894, fell for determination. The learned judge said: "Where the exact point has been raised by a special case, and fully argued, and decided by an unanimous judgment of the Court of Session, and where the question is simply one that turns upon the construction of a statute which extends to Scotland as well as to England, I think my duty as a judge of first instance is to follow that decision, leaving the parties, if so advised, to have it reviewed elsewhere." This was followed by Horridge J. in *Brooks* v. *Inland Revenue Commissioners* (2), where he quoted the passage I have just referred to, and said: "The Finance (1909-10) Act, 1910, is a statute which extends to Scotland as well as to England, and the decision of the Court of Session was an unanimous judgment of Lord Johnston, the Lord President, and Lord Kinnear. It seems to me to deal expressly with the point raised for my decision in this case, and I feel it is my duty, without expressing my view of the point dealt with, to hold that this appeal ought to be allowed and the case remitted to the Special Commissioners." I think, therefore, that under these exceptional circumstances I ought to follow the majority judgment in the Irish Courts, and so in the result the appeal succeeds.

Appeal allowed.

Solicitors for appellant: *Trower, Still, Parkin & Keeling.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) [1911] 1 Ch. 459, 466. (2) [1913] 3 K. B. 398, 406.

Note 1.

Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 163: "Any person charged or chargeable to the duties granted by this Act, either by assessment, or by way of deduction from any rent, interest, or other annual payment to which he may be entitled, who shall prove before the Commissioners for General Purposes, in the manner hereinafter mentioned, that the aggregate annual amount of his income, estimated according to the several rules and directions of this Act, is less than 150*l.* shall be exempted" from income tax.

Sect. 164: "Every person claiming to be entitled to . . . . exemption . . . . shall . . . . deliver . . . . a notice of his claim for such exemption, together with a declaration and statement . . . . declaring . . . . all the particular sources from whence the income of such claimant shall arise, and the particular amount arising from each source, and also every sum of annual interest or other annual payment reserved or charged thereon, whereby the income shall or may be diminished . . . ."

Sect. 190, Sched. G, r. 17, sets forth in the following terms the "lists, declarations, and statements of discharge, or in order to obtain exemptions" which a claimant has to make:

"Second.—Declaration of the amount of rents, interests, annuities, or other annual payments, for which the party is liable to allow and deduct the duty, with the names of the respective persons by whom such payments are to be made, distinguishing the amount of each payment:"

"Third.—Declaration of the amount of interest, annuities, or other annual payments, to be made out of the property or profits assessed on the claimant, distinguishing each source:"

By the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 54, it was provided that any person who had made insurance on his life or the life of his wife or contracted for a deferred annuity on his own life or the life of his wife was to be allowed an abatement of duty in respect of the annual premiums paid.

Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 66, sub-s. 1, imposes the super-tax.

Sub-s. 2: "For the purposes of the super-tax the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions . . . . under the Income Tax Acts; but in estimating the income of the previous year for the purpose of super-tax . . . . (*b*) there shall be deducted the amount of any premiums in respect of which relief from income tax may be allowed under section 54 of the Income Tax Act, 1853 (as extended by any subsequent enactment); . . . ."

Finance Act, 1916 (6 & 7 Geo. 5, c. 24), s. 36, sub-s. 1: "The relief given under s. 54 of the Income Tax Act, 1853, as amended by any subsequent enactment, ... shall not, as regards any insurance or contract for a deferred annuity, be given, notwithstanding anything

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in paragraph (*b*) of sub-section (2.) of section 66 of the Finance (1909-10) Act, 1910, for the purposes of super-tax."

Note 2.

[IN THE HIGH COURT OF JUSTICE IN IRELAND. KING'S BENCH DIVISION.]

LORD MASSY *v.* COMMISSIONERS OF INLAND REVENUE.

This was a case stated by the Special Commissioners of Income Tax, and raised the question whether Lord Massy, in computing the amount of his income from all sources for the purposes of super-tax, was entitled to a deduction from his income of premiums on certain policies of insurance effected on the life of his son, the Hon. Hugh Somerset Massy. Lord Massy had, as surety for his son, covenanted to and did pay the premiums. The son, by mortgages dated May 31, 1907, and August 22, 1910, had raised moneys on mortgage of his life estate in settled property, and had further secured the debts by policies of insurance on his life. Lord Massy was a party to the mortgages, and thereby covenanted with the lenders to pay the interest on the loans and the premiums on the policies in case of non-payment by his son. The latter was adjudicated a bankrupt in December, 1908, and never made any payment of interest or premiums in respect of the mortgages, and Lord Massy had been obliged to pay the same. It did not appear from the case stated whether Lord Massy deducted, or sought to deduct, from the mortgagees income tax on the periodical payments of the interest, but it was stated in the course of the hearing by an official of the Inland Revenue that, so far as the interest was concerned, Lord Massy was given credit for it in his return for assessment to super-tax, but his further claim for a deduction of the premiums was opposed, and he was accordingly assessed on their amount. That assessment was confirmed by the Special Commissioners, who, pursuant to s. 59 of the Taxes Management Act, 1880, stated the case on the application of Lord Massy.

1915. July 29. The following judgment was read by

PALLES C.B. I regret to say that I am unable to concur with the view taken by my learned brethren. In my opinion the decision of the Special Commissioners was right, and although, having regard to the view taken by my learned brethren, that opinion has no effect, still I think it right to state the grounds upon which it is founded.

The question upon this appeal by case stated from the Special Commissioners of Income Tax involves the consideration of the deductions which the appellant is entitled to make from his income to ascertain the amount of his assessment for super-tax under the Finance (1909-10) Act, 1910.

By s. 66 of that Act this tax is imposed upon incomes over 5000*l.*, which for the purposes of the tax sub-s. 2 of that section directs to be estimated in the same manner, subject to certain deductions, as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts.

A question different from the present in reference to this section came before the House of Lords last year, in *Inland Revenue Commissioners* v. *Brooks* (1), and it was there considered that the mode of estimating total income from all sources thus prescribed was that contained in ss. 163, 164 and 190, Sched. G, r. 17, of the Act of 1842. That Act related to England only, but was, with certain amendments, extended to Ireland by the Income Tax Act, 1853, and it is upon the provisions of those sections that the present case depends.

This 163rd section of the Act of 1842 is the first of a series of sections, 163–171, which are headed "Exemptions." It enacts "that any person charged or chargeable to the duties" of income tax "either by assessment, or by way of deduction from any rent, annuity, interest, or other annual payment to which he may be entitled, who shall prove before the Commissioners for General Purposes, in the manner hereinafter mentioned, that the aggregate annual amount of his income, estimated according to the several rules and directions of this Act, is less than 150*l.* shall be exempted from the said duties." This is the enactment which confers the right to exemption. The manner in which this is to be proved referred to in the section—the machinery for carrying the section into effect—is prescribed by the next section, the 164th. In my view of this part of the case, which I consider a cardinal part, I entirely concur with the view of the 163rd section taken by my brother Kenny. (2)

(1) [1915] A. C. 478.

(2) In the course of his judgment Kenny J. said: "Section 163 takes the case of a taxpayer who has either paid his tax directly to the Crown through the medium of direct assessment or has had it deducted from him for purposes of recoupment where and so far as his income consists of 'an annuity, interest or other annual payment.' Where such a taxpayer, that is such a recipient of income, is able to establish 'in the manner hereinafter mentioned that the aggregate annual amount of his income, estimated according to the several rules and directions of this Act, is less than 150*l.*,' the section enacts that he is to be exempted from tax and is to be entitled to be repaid the amount of all deductions or payments on account thereof. Two matters are to be noted in connection with this provision, namely, that the amount of the income is to be estimated in accordance with the 'rules and directions' of the Act and that the mode of establishing the claim to exemption is that which is subsequently pointed out. I think that the result of this provision is that, notwithstanding the language of the following section, s. 164, which has been so much relied on, no deduction can be made from gross income for the purpose of bringing the net income below 150*l.* which is not sanctioned by some rule or direction contained in the Act, or, to put it in a more concrete form, which would not be admissible in an ordinary return of income or by way of deduction as against a recipient of a yearly sum. In my opinion the language of this 163rd section is unambiguous on this point."

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To understand this section the general scheme of the Act of 1842 must be considered. By the sections previous to the 163rd it enumerated several items of property the income of which it subjected to the tax, and the manner in which and the persons by whom the tax on each subject of taxation is to be assessed. The greater number of these are to be taxed by direct assessment, but the tax on rent, interest, or other annual payment is in some cases prescribed to be deducted by the payer from the amount payable. The first thing, therefore, necessary to work out the right to exemption was to aggregate together the various items of subjects of taxation with which the person claiming the exemption was charged, either by assessment or by way of deduction, and, accordingly, the first provision of the section is that such person shall within a specified time deliver to the assessor of the place in which he resides a notice of his claim for exemptions, together with a declaration or statement setting forth the particular sources of his income and the amount arising from each source. Had the section stopped there it would have been manifestly insufficient to enable a determination to be made whether the person was entitled to the exemption he claimed. An owner of land assessed at 300*l.* a year and without other income might be liable to 200*l.* a year annual interest on a mortgage; a civil servant with a salary of 200*l.* and no other source of income may live in a house assessed at 30*l.* per year, and may owe a mortgage debt of 600*l.* on which the annual interest is a further 30*l.* a year. Under s. 40 of the Income Tax Act, 1853, the landowner is entitled to deduct from his mortgagee and the civil servant from his landlord and creditor respectively a proportionate amount of income tax on these sums, so that in each case the total amount of income they shall have paid tax on will be less than 150*l.* In the first 100*l.* instead of 300*l.*, in the other 140*l.* instead of 200*l.* Each would thus be entitled to exemption, but the information furnished to the assessed would not have shown this, and the assessor, if the section did not proceed further, would know nothing of the deductions—nothing but that the income of each was prima facie subject to the tax, was above the exemption limit, in the one case 300*l.*, in the other 200*l.*, and, therefore, that neither was entitled to deduction. This I have stated for the purpose of clearly arriving at the question in this case, because if the section did not go further the assessor would not be able to decide upon the exemption. All this was foreseen by the draftsman of the Act of 1842. Consequently the section proceeds to require that the statement or declaration shall also state "every sum of annual interest or other annual payment reserved or charged thereon, whereby the income shall or may be diminished, and also every sum which such claimant may have charged or may be entitled to charge against any other person for or on account of the duty . . . . or which he may have deducted or retained, or may be entitled to deduct or retain, under the authority of this Act, from or out of any payment to which he may be or become liable. . . . . " I entertain no doubt, upon the consideration of the entire Act, that those words in the 163rd section are part of the general scheme of the Act and must be limited to annual interest or other annual payment reserved or

charged thereon which is a rent or other annual payment subject to income tax. All this information was essential to enable the title of the claimant to exemption and the amounts to be repaid to be shown. Sect. 190, Sched. G, r. 17, contains the particulars of the declaration referred to in this section.

It is under these enactments that the appellant, Lord Massy, claims to be allowed a deduction for the premiums on policies of assurance on the life of his son the Hon. Hugh Somerset John Massy, which Lord Massy has charged upon his estate and is also personally liable to pay. These assurances appear upon the face of the deeds referred to in the case to have been mortgaged and to be securities under which the capital sums thereby assured will be payable to creditors of the Hon. Hugh Massy. Now in my opinion it is quite clear that these premiums are not proper deductions. One of my learned brethren, or both, indicate that there is no distinction between the annual interest on the mortgages, in respect of which we were informed by an official of the Inland Revenue that Lord Massy had been allowed deduction, and these premiums. I may be quite wrong in my opinion, but the distinction appears to me to be perfectly clear. With regard to the interest on the mortgages, s. 102 of the Act of 1842 and s. 40 of the Act of 1853 beyond all question show that it is liable to income tax under the Acts and that Lord Massy is entitled to make a deduction in payment, and if he were entitled to deduct from the lenders of the sum under the deeds in respect of income tax on the premiums I should agree with my colleagues; but the distinction is that in respect of one he is entitled to deduct, in respect of the other he is not: in one case the Government gets the tax from the other party, in the other case it gets no tax at all.

I base this opinion on two grounds. First, that s. 164 is subsidiary to s. 163 and that the latter section shows that to entitle to exemption the income must be reduced to 150*l.*, estimated by the several rules and directions of this Act, and, consequently, to bring the result arrived at by the calculation in s. 164 to the sum entitling the claimant to exemption under s. 163 no deduction can be allowed which is not authorized by some other provision of the Act. My second reason is that in my opinion an investment as capital of part of the income of a person is not a payment whereby the income shall or may be diminished. In my opinion, when once a sum becomes income within the meaning of the Acts the Act does not, except in the special cases mentioned, consider the application of that income. Were it otherwise, a person having 1000*l.* a year income might claim exemption from income tax by investing 800*l.* of it in Consols.

Now in my opinion it is quite clear that those premiums are not proper deductions. Not being on the life of Lord Massy or his wife, they are not within s. 54 of the Act of 1853, or any other special section entitling them to exemptions from the tax. Further, they are payments of part purchase-money of capital sums payable at a deferred period, and neither are liable to income tax: *Foley* v. *Fletcher* (1);

(1) 3 H. & N. 769.

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Secretary of State in Council of India v. *Scoble* (1); and in my opinion the true meaning of the words in s. 164 relied on by appellant, "annual payment reserved or charged thereon whereby the income shall or may be diminished," is payments in respect of which the claimant is entitled under the Act to a deduction of income tax thereon, such as incumbrances, or land head rents, and matters of that nature.

The judgment of the Court comes to this, that Lord Massy is entitled to deduct for the purpose of exemption the premiums, and this goes to the extent that on the true construction of the Acts a person paying ordinary premiums is entitled to deduct from the insurance company when making the annual payment.

In my opinion that involves an entire misconception of the Income Tax Acts. In my opinion the exemption here claimed cannot be allowed.

J. E. A.

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May 18, 24.

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND, APPELLANTS *v.* COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Reversion Duty—Total Value of Land—Building Lease—Computation of Total Value at Grant of Lease—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 13, *sub-ss.* 1, 2; *s.* 25, *sub-ss.* 1, 3; *s.* 41.

By s. 13, sub-s. 1, of the Finance (1909-10) Act, 1910, "On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value."

By sub-s. 2, "For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount (if any) by which the total value (as defined for the purpose of the general provisions of this part of this Act relating to valuation) of the land at the time the lease determines . . . . exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease."

By s. 25, sub-s. 1, "The gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge or restriction (other than rates or taxes), might be expected to realise."

Sub-s. 3 defines the total value as the gross value after certain deductions.

By s. 41 the expression "lease" includes an agreement for a lease.

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(1) [1903] A. C. 299.

By s. 3, sub-s. 2, of the Revenue Act, 1911, "Where, whether before or after the passing of this Act, a lease of any land determines on the vesting of the lessor's interest and the lessee's interest in the same person before the expiration of the term for which the lease was granted, the amount of the reversion duty (if any) payable shall not be the full duty, but such an amount as would, with compound interest at the rate of 4 per centum per annum for the residue of the term for which the lease was granted, produce the amount of the full duty":—

Held, that where an agreement to grant a lease has been made in consideration of the payment of a rent and the expenditure of a certain sum in the erection of buildings "the total value of the land at the time of the original grant of the lease" is to be ascertained on the determination of the lease by adding to the capitalized value of the rent, not the amount expended in the erection of the buildings, but the present value of such amount as at the date of the lease on the basis that the enjoyment of the benefit of such expenditure is, so far as the reversioners are concerned, deferred until the expiration of the term.

APPEAL by the Ecclesiastical Commissioners for England against the decision of a referee under the Finance (1909-10) Act, 1910, upon an appeal against an assessment of reversion duty by the Inland Revenue Commissioners.

The appellants were the owners of the freehold of the hereditament assessed, No. 26, Strutton Ground in the city of Westminster.

On March 27, 1916, the respondents served notice of assessment and notice to pay reversion duty as follows:—

	£	*s.*	*d.*
Total value at the determination of the lease ..	2400	0	0
Total value at grant of lease (on basis of rent reserved and payments made)..	1022	0	0
Value of benefit accruing to lessor..	1378	0	0
Full duty	137	0	0
Reduced amount payable	7	7	11

On June 28, 1907, an agreement in writing was entered into between the appellants and the firm of Barlow & Roberts. By this agreement it was provided that the appellants should, on receipt of a certificate from their surveyors that the buildings agreed to be erected had been erected to their satisfaction, subject to the stipulations of the agreement, grant to Barlow & Roberts the lease or leases of a piece of land then forming the site of messuages known as Nos. 22, 24, 26, and 28, Strutton Ground in the city of Westminster,

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and of the buildings agreed to be erected thereon, for the term of eighty years from June 24, 1907, at the rent of 40*l.* for the first year and 160*l.* for every subsequent year of the term. Barlow & Roberts agreed forthwith, to the satisfaction of the said surveyors, to remove the said messuages and thereafter to erect the said buildings and to expend thereon a sum of not less than 3000*l.* It was further expressly provided that nothing contained in this building agreement should operate as an actual demise of the said piece of land and premises to Barlow & Roberts or to give to or vest in them any term of years in the said premises. A form of lease was referred to in the building agreement as the form to be adopted on the grant of the intended leases.

Shortly after the making of the building agreement Barlow & Roberts, who carried on the business of builders, themselves removed the existing messuages and erected the prescribed buildings to the satisfaction of the appellants' surveyors, who duly granted the necessary certificates in that behalf. The amount expended in the erection of the premises known as No. 26, Strutton Ground was 900*l.* The builders' reasonable profit thereon had been agreed at 150*l.*

The appellants thereafter granted to Barlow & Roberts four several leases, whereof the one material to the present case was a lease, dated December 19, 1907, of No. 26, Strutton Ground for a term of eighty years, commencing on June 24, 1907, at the rent of 10*l.* for the first year of the term and thereafter at a yearly rent of 40*l.* This lease was in the form prescribed by the building agreement.

By an underlease dated January 2, 1908, Barlow & Roberts subdemised No. 26, Strutton Ground to Mr. John Hayes for a term of twenty-one years, determinable at the end of the seventh or fourteenth year, at the yearly rent of 130*l.* The underlease was subsequently surrendered to a mesne assignee of the term created by the lease.

By an indenture dated February 1, 1913, Dr. Kelly, who by divers mesne assignments had become the assignee of the term created by the lease, surrendered the same to the appellants, together with certain other premises, in consideration of an agreement by the appellants to grant him a new lease in respect of the premises.

It was on the surrender of the lease that the occasion arose on which reversion duty was claimed.

On the receipt of the notice of assessment and notice to pay duty the appellants gave notice of their intention to appeal to the referee against the assessment. The particulars of the grounds of appeal were—that the figure of 1022*l.* in the notice of assessment did not represent the total value of the premises at the time of the original grant of the lease; that such total value should be the total value as defined by s. 25 of the Finance (1909-10) Act, 1910, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease, as provided by s. 13, sub-s. 2, of the Act; and that upon the basis of 40*l.* rent reserved and 900*l.* payment made the total value of the premises at the time of the original grant of the lease should be 2200*l.*

The appeal was heard by the referee on May 9, 1916, and all the above facts were proved or admitted before him.

Evidence was given for the appellants by Mr. B. M. Johnson, a member of the firm of Messrs. Clutton, surveyors and agents to the appellants, as to the method of arriving at the total value of the piece of land No. 26, Strutton Ground at the time of the original grant of the lease on the basis of the rent reserved and the payments made in consideration of the lease. The following table was put in and proved by him :—

Rent reserved		£40 per annum
Payments made :		
Cost to builder of erection of buildings	£900	
Builder's reasonable profit	150	
Normal cost to lessee	£1050	
Reasonable rate of interest which lessee would expect on such a property in this position, 8 per cent.		£84
Annual value which lessee would expect at eighteen years' purchase		£124 per annum
Total value at grant		£2232
Total value at termination (as agreed) ..		£2400
Total value at grant (as above)		2232
Difference		£168

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His evidence was corroborated by the evidence of Mr. L. R. Vigers, who confirmed Mr. Johnson's method and conclusions.

Evidence was given for the respondents by Mr. R. A. Dash to the effect that in his opinion total value meant market value at the time of the original grant of the lease, meaning market value of the lessor's interest, and that the method to be adopted in ascertaining the total value of the land at the time of the original grant of the lease was to take the rent reserved, multiply it by twenty-five years' purchase, and add the cost of building, including builder's reasonable profit, deferred eighty years on the 5 per cent. table.

On May 26, 1916, the referee gave the following decision :—

" This appeal is against the assessment of premises known as No. 26, Strutton Ground, Westminster, to reversion duty. The total value at the determination of the lease has been agreed at 2400*l.* The total value at the grant of the lease on the basis of the rent reserved and payments made has been assessed at 1022*l.* ; and the appellants appeal against this assessment, which they say should be 2232*l.* The land which is the subject of the appeal was let with other adjoining sites on a building agreement for a lease by the appellants on June 28, 1907, for the erection of a shop and dwelling-house, on which 750*l.* was to be spent by the lessee, subject to a ground rent of 40*l.* a year.

" The building was erected, and the lease for eighty years from June 24, 1907, was granted on December 19, 1907.

" It is agreed that the builder actually spent 900*l.* on the building and that his reasonable profit on that expenditure was 150*l.*, making the total expenditure on the building 1050*l.* The lessee underlet the premises at a rent of 130*l.* a year for twenty-one years on January 2, 1908, and surrendered the lease on February 1, 1913, the surrender taking effect as from December 25, 1912, and being the occasion for the assessment appealed against. By s. 13, sub-s. 1, of the Act it is provided that reversion duty is to be levied on the value of the benefit accruing to the lessor by reason of the determination of the lease, and by s. 13, sub-s. 2, that the value of the benefit so accruing shall be deemed to be the amount by which the total value (as defined for the purpose of the general provisions of this part of the Act relating to valuation) of the land at the time the lease determines (subject to deductions which are not required to be made in this

case) exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease.

"It was argued for the appellants that the sub-section does not make any distinction between the meaning of total value at the grant of the lease and the meaning of total value at its determination, and it was contended that the valuation should be in accordance with the table put in by Mr. B. M. Johnson and set out above.

"It was argued for the respondents that the sub-section does make a distinction between the meaning of total value at the original grant and of total value at the determination of the lease, and that the valuation should be as follows:—

Agreed total value at determination of lease			£2400
Total value at original grant of lease:			
Rent reserved	£40		
Years' purchase	25		
	—	£1000	
Payments made:			
Cost of building, including reasonable profit	£1050		
Deferred 80 years on 5 per cent. table		£22	£1022
Benefit			£1378

"I am of opinion that the sub-section does make a distinction between the meaning of total value at the original grant and of total value at the determination of the lease.

"As the sub-section specially provides that the total value at the determination of the lease shall be as defined for the purpose of the general provisions of this part of the Act, it appears to me to imply a distinction between the total value so ascertained and the total value afterwards referred to as to be ascertained on the basis of rent reserved and payments made in consideration of the lease. This view seems to me to be confirmed by the fact that the object of the section is to ascertain the actual benefit accruing to the lessor by the determination of the lease, and that unless there is a distinction between the total values at the grant and at the determination of the lease the benefit supposed to be shown by the valuations would, in the majority of cases, have no relation to the actual facts.

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"In my opinion, therefore, the respondents have adopted the correct principle for ascertaining the total value at the grant of the lease, although I think that their valuation requires some correction in detail. It should, in my opinion, be as follows:—

Agreed total value at end of lease			£2400
Total value at grant of lease:			
Rent reserved—			
Ground rent	£40		
Years' purchase	25		
		£1000	
Payments made—			
Cost of erection, including builder's profit	£1050		
Reasonable interest, 8 per cent. ..	84		
Ground rent	40		
	124		
Years' purchase	18		
	£2232		
Deferred for term of lease, eighty years, on 5½ per cent. table ..	·013	29	1029
		Benefit	£1371

"This modification in the valuation will, however, make no practical difference in the amount of duty payable, and therefore the decision on the appeal in respect of which notice of appeal has been given is that the assessment be confirmed and that the appellants pay the costs of the respondents."

The appellants contended that the above decision was erroneous in point of law on the following grounds:—

(1.) Because the decision of the referee did not correctly interpret or give effect to the provisions of s. 13, sub-ss. 1 and 2, and s. 25, sub-s. 3, of the Finance (1909-10) Act, 1910, which were to be read together, and when so read meant that the total value of the land at the time of the original grant of the lease was the market value at that time of the fee simple in possession, not subject to any lease, ascertained on the basis of the rent reserved and the payments made in consideration of the lease.

(2.) Because in so far as the said decision, in approving the principle adopted by the respondents for ascertaining the total value at the grant of the lease, was based on the value of the lessors' interest in the land at the date of the grant thereof, the same was based upon an erroneous datum and was contrary to the true interpretation of the said sections.

(3.) Because the data, the method, and the result of the appellants' calculations were correct and in conformity with the true interpretation of the said sections.

Ryde K.C. and *Barrington-Ward* for the appellants.

Sir Gordon Hewart S.-G. and *W. R. Sheldon* for the respondents.

Cur. adv. vult.

1917. May 24. LUSH J. This case raises a question of some importance with regard to reversion duty. The question is, What is the true principle to be applied in order to ascertain what is the value of the benefit accruing to the appellants through the determination of the lease under s. 13, sub-ss. 1 and 2, of the Finance (1909-10) Act, 1910, and s. 3, sub-s. 2, of the Revenue Act, 1911 ?

The Finance (1909-10) Act, 1910, contains in s. 13 certain provisions with a view to ascertaining what is the value of the benefit accruing to a lessor by reason of the determination of the lease, and says in sub-s. 1 : " On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value." It says in sub-s. 2 : " For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount (if any) by which the total value (as defined for the purpose of the general provisions of this part of this Act relating to valuation) of the land at the time the lease determines . . . . exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease." Sect. 14 contains a provision in sub-s. 3 with a view to ascertaining the benefit that

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has accrued in the case of a lease being surrendered, or, as the section says, being "determined before the expiration of the term of the lease," but that section was repealed by s. 3, sub-s. 5, of the Revenue Act, 1911, and replaced by sect. 3, sub-s. 2, which provides as follows: "Where, whether before or after the passing of this Act, a lease of any land determines on the vesting of the lessor's interest and the lessee's interest in the same person before the expiration of the term for which the lease was granted, the amount of the reversion duty (if any) payable shall not be the full duty, but such an amount as would, with compound interest at the rate of 4 per centum per annum for the residue of the term for which the lease was granted, produce the amount of the full duty." Under this section it is only necessary, in order to arrive at the duty payable on a surrender, to take a proportion of the duty which would be payable if the term had determined by effluxion of time; so that all that is necessary in the present case is to consider what duty would be payable in the latter event.

Before considering the meaning and effect of s. 13, sub-ss. 1 and 2, it is necessary to refer to two other sections of the Act of 1910, namely, ss. 25 and 41. Sect. 25 begins by defining the gross value of land. Sub-s. 3 defines the "total value of land," which is the expression used in connection with this case, but, inasmuch as the definition of "total value of land" is given as the gross value after deducting certain sums which have not to be deducted in this case, it is sufficient to rely upon the definition of "gross value." Now by sub-s. 1, "The gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes), might be expected to realize." Now I turn to s. 41, which is also an interpretation section. The 4th paragraph of that section says: "The expression 'lease' includes an under-lease and an agreement for a lease or under-lease." Then a little lower down it says: "The expression 'fee simple' means the fee simple in possession not subject to any lease."

It will be seen, therefore, that what the Legislature has enacted with a view to imposing reversion duty on the freeholder of property to whom a benefit has accrued through a lease which had been

granted by him or his predecessors coming to an end and the reversion falling in is this: One has to arrive at two valuations—first, a valuation of the amount at which the fee simple of the land could have been sold in the open market by a willing seller in its then condition, possession being given and the estate being sold free from incumbrances at the date of the determination of the lease; and, secondly, a valuation of the amount for which it could have been sold at the date when the lease was granted. But the second valuation must be made on the basis of the rent reserved and the payments made in consideration of the lease. The difference between the two figures gives the value of the benefit accruing through the determination of the lease. "Lease," as I have pointed out, includes an agreement for a lease. There is no dispute between the appellants and the Crown as to the valuation at the date of the determination of the lease. The agreed figure is 2400*l.* The dispute relates only to the valuation at the time when the lease was granted. Treating for the moment the agreement for the lease as the lease for this purpose, the appellants contended that s. 13, sub-s. 2, contemplates that where a lessee has covenanted to expend a sum of money in building one must, in order to ascertain the value at the time the lease was granted, take the whole of the money to be expended and the capitalized payments for rent and treat these moneys as representing that value. The section, it was said, makes no distinction between the total value at the two periods with which it deals, and one must compare, Mr. Ryde said, like with like, because the section refers to the payments made in consideration of the lease, and this, he said, is true of the whole sum expended, not of part only. Adopting this method of calculation, the value at the date when the lease was granted works out at 2232*l.*, and, deducting this from the other agreed figure of 2400*l.*, the result is 168*l.* as the value of the "benefit accruing." The Solicitor-General on behalf of the Crown, on the other hand, contended, as was contended before the referee, that this is an entirely erroneous method; that the section does draw a distinction between the total values at the two periods; that the section does not say that the whole of the payments and the capitalized rent are to be taken as representing the value at the date when the lease was granted, but that the valuation is to be made on the basis of the

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rent and the payments. It was further contended that the whole of the moneys expended are not really expended in consideration of the lease, because the lessee really expends the greater part of the moneys for his own benefit in order to enable him to deal for himself with the improved property. The method adopted, applying this principle, was to take the present value of the moneys expended, the enjoyment being deferred, so far as the reversioners are concerned, until the expiration of the term. On this principle the value at the date when the lease was granted worked out, on the figures given before the referee, at 1022*l.*, or, on the adjustment made by the referee, at 1029*l.* Deducting this sum from the agreed figure of 2400*l.* gives 1371*l.* as the value of the "benefit accruing." I would point out that no alternative method other than that of taking the present value of the moneys expended by the lessees was suggested by the appellants. The only question raised was whether they were right in contending that the whole of the payments are to be added to the capitalized rent. In my opinion their contention is wrong, and the contention of the Crown is correct. If the appellants are right, reversion duty becomes a matter of trifling importance. It was imposed, according to the appellants' contention, in order to meet the case of property having by adventitious circumstances risen in value since a lease was granted, and that, in substance, is all that was contemplated. In my view that is an entire mistake. I think that it was also intended, if not primarily intended, to meet the not uncommon case of the owner of land parting with the land and the usufruct of the land for a defined period, taking a comparatively small sum by way of rent during that period with a view to securing at the end of that period a property which has been greatly enhanced in value by reason of the expenditure of money by the lessee. The principle contended for by the appellants takes no account of this benefit and leaves it untaxed. That the freeholder does obtain a benefit or advantage through the lease coming to an end is obvious. The advantage which the lessee had enjoyed during the term of obtaining the full rent, for which he was willing to make the agreed payments, has now passed to the freeholder. He has now become the owner in possession of a property which can be let for a higher rent, and, therefore, will command a higher price in the market. Mr. Ryde said that we have only to

ascertain what the two valuations are which are provided for by s. 13, sub-s. 2. I do not agree with this. One must bear in mind what the object of the two valuations is, namely, the ascertainment of the benefit accruing to the freeholder ; and if the section can be read in two ways, one of which leads to the true solution of the problem and the other does not, the former is obviously the right way in which to read it. But in truth I think that the language of the section, giving to the words their natural and ordinary meaning, is against the appellants' contention. I do not agree with the argument which was advanced on behalf of the Crown that only part of the moneys expended was expended in consideration of the lease. I do not think it is right to say that the greater part of the payments made were made in consideration of the benefit which the lessees would derive from having the land with the new buildings on it to deal with. That was no doubt the lessees' motive in agreeing to expend the moneys, but formed no part of the consideration, a distinction which was pointed out by Sir George Jessel M.R. in *Besant* v. *Wood.* (1) The whole of the moneys were expended in consideration of the lease. This view was, I think, taken both in the Court of Appeal and the House of Lords in the case of *Inland Revenue Commissioners* v. *Marquess Camden.* (2) But I agree with the Solicitor-General that the section only provides for a valuation " on the basis " of the rent and payments, and does not enact that the whole of the payments plus the capitalized rent shall be treated as giving the valuation which has to be made. This could easily have been said had it been intended. The Legislature obviously considered that it would be safer to exclude extraneous evidence which might, and probably would, be untrustworthy after a long lapse of time. The Act states what the basis of the calculation is to be, and leaves it to the valuer to say, taking the length of the term and other matters into account, what the true value was. That the referee has done, and he has in my opinion rightly rejected the theory put forward by the appellants.

The precise question I have to decide has never in fact come up for decision. But it was discussed in the House of Lords in *Inland Revenue Commissioners* v. *Marquess Camden.* (2) It was not necessary to decide it, as the only question there was

(1) (1879) 12 Ch. D. 605, 617. (2) [1915] A. C. 241.

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whether the payments by the lessee, not having been made to the lessor, ought to be taken into account at all. It was pointed out that if they were, no question had been raised as to whether the whole or part of the moneys should be taken into account. But Lord Atkinson deals with this question where he says this (1): "Where the payments made in consideration of the lease are not made to the lessor, but made by the lessee to those who have erected buildings on the land in consideration of which, as well as of the rent, the lease was granted, I quite concur with the Court of Appeal in thinking that they must be taken into consideration in ascertaining this second total value. This outlay presumably makes the rent more secure, and therefore more valuable, and on the termination of the lease, either by effluxion of time or otherwise, the value of the land as it stands may be enhanced by the existence upon it of those buildings; but I think the benefit which the lessor gets in this case is not equivalent to that which he would receive if, the rent being the same, a premium had been paid to him equal in amount to the sum expended in the erection of the buildings. In the case of the premium the lessee pays this sum together with the rent for the use of the land, in its condition as granted or contracted to be granted, and it may, therefore, furnish a good measure of the then value. In the second case he pays it for the use not merely of the land in that condition, but of the land with the buildings upon it which he himself has erected or will erect. His capital, to the amount of the premium, is finally parted with in the one case; while in the other that which it represents can be enjoyed by him during the term of the lease. The land with the buildings upon it never was, until the termination of the lease, the property of the lessor, freed from the lessee's right to use them; he never could have disposed of it, with the buildings on it, free from that right." Then Lord Atkinson proceeds to say that it was not necessary to decide whether you must take the total sums or only part. Lord Parmoor, on the other hand, appears to me to suggest that the whole amount would be capitalized, but does not discuss the question in any detail. Lord Dunedin and Lord Shaw left the question open and expressed no opinion with regard to it. In a still more recent case of *Inland Revenue Commissioners* v. *St. John's College, Oxford* (2)

(1) [1915] A. C. 251. (2) [1915] K. B. 621, 638.

my brother Rowlatt discussed the question, and he says, speaking of the fine which in that case was payable upon a renewal: "If a payment, e.g. a fine, is made when the lease is granted, it is not suggested that I am simply to take that lump sum and add it on to the value of the rent reserved under the lease; that would be an absurdity. I have to take the payment made—frequently called a fine—with reference to what it is paid for." Then he points out that in the circumstances of that case the sum must be made only the basis of the calculation. I think that that view accords with the view which I take, and I must hold therefore, for the reasons which I have given, that the view contended for by the Crown upon the main question is right.

Mr. Ryde for the appellants raised a subsidiary point which I can deal with briefly. He said that here one has two documents to deal with—a building agreement which has to be treated, according to the statute, as a lease, and a subsequent lease. When the lease was granted the buildings had been erected, and he contended that the agreement for a lease having determined upon the execution of the lease, I must hold that the first valuation is to be made as at the time when the agreement came to an end, and, if so, the land had already received its enhanced value. This highly technical argument is, in my opinion, not well founded. The agreement for a lease no doubt ceased to be operative when it matured into the lease which was the subject-matter of the agreement, but there was no determination of any lease within the meaning of s. 13. The agreement was performed, and the intended lessee who had the right to have it performed became the actual lessee. But there was no real change in his position. His equitable interest became a legal one and that is all.

For these reasons I hold that the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: *The Solicitors to the Ecclesiastical Commissioners.*

Solicitor for the respondents: *The Solicitor of Inland Revenue.*

J. F. W.

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March 19, 26.

BOYCE *v.* HILL; DICKINS, THIRD PARTY.

Emergency Legislation—Building Agreement—Contract of Tenancy—Liability of Builder for Rent—Government Restrictions on Building—Power of Court to relieve against Liability—"Any contract whatsoever"—Courts (Emergency Powers) Act, 1917 (7 & 8 *Geo.* 5, *c.* 25), *s.* 1, *sub-ss.* 2, 3.

By s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1917, "Where, upon an application by any party to any contract whatsoever, the court is satisfied that, owing to any restriction . . . . imposed . . . . by or in pursuance of any enactment relating to the defence of the realm or any regulation made thereunder . . . . any term of the contract cannot be enforced without serious hardship, the court may . . . . suspend or annul the contract or stay any proceedings for the enforcement of the contract or any term thereof or any rights arising thereunder on such conditions (if any) as the court may think fit." By sub-s. 3, "This section shall be construed as one with the Courts (Emergency Powers) Act, 1914." By s. 1, sub-s. 1, of the Courts (Emergency Powers), Act, 1914, it is enacted that no steps shall be taken by execution, distress, re-entry, or otherwise for the enforcement of the payment of a sum of money to which the sub-section applies except after application to the Court, provided that "This sub-section shall not apply to any sum of money (other than rent not being rent at or exceeding fifty pounds per annum) due and payable in pursuance of a contract made after the beginning of the fourth day of August nineteen hundred and fourteen":—

Held, that the words "any contract whatsoever" in s. 1, sub-s. 2, of the Act of 1917 include a contract to pay rent exceeding fifty pounds per annum even though made after August 4, 1914.

TRIAL of a preliminary point of law in an action before Lush J.

The action was brought to recover 238*l.* 15*s.* in respect of a quarter's rent of 70, New Bond Street, payable on June 24, 1917, under an agreement for a building lease dated August 19, 1914, made between the plaintiffs and the defendant. By the said agreement the defendant was to pull down the existing building and erect another building on the site within nine months from the date of possession of the site being given, and upon completion the plaintiffs were to demise the premises to the defendant for a term of eighty years from Lady Day, 1913, at a yearly rent of 955*l.* In the meantime the defendant was to be deemed tenant at will to the plaintiffs

from the date when possession should be given at the same yearly rent. Possession was given to the defendant immediately on the execution of the agreement. In November, 1914, H. Wynne Taylor entered into an agreement with the defendant to execute the works. Colonel Dickins financed the said Taylor in respect of his obligations under that agreement. In May, 1916, Taylor was adjudicated a bankrupt, and his trustee disclaimed the agreement. On November 30, 1916, Colonel Dickins entered into an agreement with the defendant to execute the works in substitution for Taylor and to pay to the defendant a rent of 1250*l.* He spent about 15,000*l.* on pulling down the old building and partially rebuilding the new one. On July 14, 1916, a regulation had been made by the Ministry of Munitions prohibiting the erection of any building without a licence. A licence was applied for, but the Minister refused it except for the purpose of completing the carcase sufficiently to protect the building from the weather. On September 21, 1917, the plaintiffs commenced the action to recover the quarter's rent above mentioned, and applied for judgment under Order XIV. The defendant raised the defence that owing to the contemplated building having been prohibited by the Ministry of Munitions the agreement to pay the rent was suspended during the war, and in the alternative that the Court should grant relief pursuant to s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1917. Leave was given to defend, and by order of the judge Colonel Dickins was added as third party. The judge further directed that the case should be entered for argument of the two points of law raised in the defence: (1.) whether the contract was suspended during the war at common law; and (2.) whether the case fell within the provisions of the Courts (Emergency Powers) Act, 1917. The first point was subsequently abandoned both by the defendant and the third party, and the case came on for hearing on the second point on the assumption that by reason of the restriction imposed by the Ministry of Munitions upon building the liability to pay the rent reserved by the agreements could not be enforced without hardship.

Schiller K.C. and *Conway* for the plaintiffs. Sect. 1, sub-s. 2, of the Act of 1917 has no application to this case. The agreement of the defendant is a contract of tenancy; it expressly provides that the

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defendant is to be deemed tenant at will during the period of building and until the execution of a lease. The sub-section does not apply to contracts of tenancy at all. For if it did, it would cover the ground covered by s. 2 (1), which deals in express terms with contracts of tenancy, and the two sections would be in conflict; for s. 1, sub-s. 2, gives the Court power to suspend or annul the contracts to which it refers where they cannot be enforced without hardship owing to a restriction imposed by Government under the Defence of the Realm legislation, while s. 2 provides that a tenant, who is bound under his contract of tenancy to do or abstain from doing something, shall not be liable to any mandatory order or injunction or any forfeiture in so far as the failure to do or the doing of the thing is attributable to a similar Government restriction, which imports that the contract of tenancy shall be kept alive. Secondly, the sub-section, even if it applies to contracts of tenancy at all, does not apply to such contracts where the rent reserved exceeds 50*l.* per annum, and where the contracts were made after the commencement of the war. For sub-s. 3 provides that s. 1 shall be construed as one with the Courts (Emergency Powers) Act, 1914, and that Act limits the relief thereby given to contracts made before the war and contracts of tenancy made after the war, by which the rent reserved is less than 50*l.* Here the contract was made after the war began and the rent reserved was over 50*l.* The object of the legislation was to provide for relief against the hardship resulting from war conditions which could not have been anticipated at the time the contract was entered into. Contracts made after the war are entered into at the contractor's peril. He contracts with his eyes open to the possibility of restrictions, and he cannot ask for relief

(1) By s. 2 of the Courts (Emergency Powers) Act, 1917, "Where by virtue of any contract of tenancy any person is bound to do or abstain from doing . . . . any act or thing and by virtue of any enactment relating to the defence of the realm or any regulation made thereunder the doing of such act or thing is wholly or partially restricted or ordered, he shall not . . . . be liable to any mandatory order or any injunction or interdict in respect of such act or thing, or be liable to pay any sum of money or incur any forfeiture or other penalty in respect of the failure to do or the doing of such act or thing, if and in so far as the failure to do or the doing of such act or thing is attributable to compliance with such restriction or order as aforesaid."

because subsequent restrictions have made his contract unprofitable.

Disturnal K.C. and *Herbert Smith* for the defendant. Here the contract in respect of which relief is sought was made on August 19, 1914, two years before the restriction was imposed, and at that date such a restriction could not have been reasonably foreseen. It was not intended by s. 1, sub-s. 3, of the Act of 1917 to cut down the generality of the words "any contract whatsoever" in sub-s. 2. It is not permissible to read into those general words the limitation "being a contract made before the war, or being a contract of tenancy at a rent of less than 50*l.*" The words mean what they say, and are meant to include contracts of all kinds and whenever made. With regard to the suggested difficulty that on the plaintiffs' construction s. 1, sub-s. 2, would be in conflict with s. 2, it is enough to say that no Court would grant a form of relief which would prevent s. 2 from operating. The Court would not be exercising its discretion under sub-s. 2 judicially if it ignored s. 2.

T. R. Hughes K.C. and *Goodland* for the third party.

Cur. adv. vult.

March 26. LUSH J. This case raises a question of considerable importance as to the construction of s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1917. The plaintiffs bring their action to recover a sum of 238*l.* 15*s.* for rent alleged to be payable by the defendant under a building agreement dated August 19, 1914. By that agreement the defendant undertook to pull down certain premises in New Bond Street and to re-erect the building at a fixed sum of considerable amount within a certain agreed period. When the building was completed a lease was to be granted of the premises by the plaintiffs to the defendant for a long term of years, and it was a term of the agreement that the defendant should be let into immediate possession of the site and should be deemed tenant at will and should pay a very considerable sum as rent to the plaintiff from the time that he was so let into possession. The defendant entered into a sub-contract with another person for the carrying out of the agreement, and by assignment Colonel Dickins is now interested under that sub-contract, and has been brought into the action

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as third party. Apart from the defence that has been raised to the action, the defendant has made an application to the Court under the sub-section to which I have referred for relief on the ground that the term with regard to the payment of rent cannot be enforced without serious hardship, and the third party, Colonel Dickins, who is under an obligation to pay an increased sum by way of rent to the defendant, in his turn applies for relief upon the same ground. It appears that owing to restrictions upon building imposed by regulations made under the Defence of the Realm Act it has become impossible for the defendant or the third party to complete the building. The result is that a very large sum of money has been expended in the partial re-erection of this building, and that owing to its unfinished state neither the defendant nor the third party can utilize the work that has been done or get any rent by letting the premises under an agreement of tenancy. The point has been taken by the plaintiffs that the present case does not fall within the provisions of that sub-section, and it was thought convenient that, before embarking on the question of fact whether a serious hardship will be imposed on the parties by the building restrictions, I should determine as a preliminary point of law whether or not the case falls within the sub-section. Now sub-s. 1 deals in terms with a contract for the construction of a building or for the supply of materials for a building entered into before the war, and it provides for relief against enforcement of the contract where owing to difficulties in procuring the necessary materials or labour it could not be enforced without serious hardship. Then comes the sub-section which I have to construe, sub-s. 2: "Where upon an application by any party to any contract whatsoever the court is satisfied," &c. [He read the sub-section.] I may say in passing that I think the words "or any term thereof" are to be read along with the words "suspend or annul the contract" as well as with the words "stay any proceedings for the enforcement." Pausing there, one would have thought the matter was clear. After dealing in sub-s. 1 with a particular kind of contracts, building contracts, made before the war, the Legislature proceeds in sub-s. 2 to deal with "any contract whatsoever." Prima facie those general words would apply to all contracts of whatever kind, and whether made before the war or after. But it is said that having regard to sub-s. 3, which provides that the section "shall

be construed as one with the Courts (Emergency Powers) Act, 1914," sub-s. 2, notwithstanding its wide language, must be read as limited to the particular class of contracts dealt with by the earlier Act, namely, contracts made before the war, and tenancy contracts at a rent below 50*l.* made after the war. It is contended that it would be absurd to suppose the Legislature, after expressly enacting that relief should not be granted in the case of post-war tenancy contracts at a rent over 50*l.* (under which head it is said the present contract falls), should in the same Act proceed to extend the relief to the class of contracts which it had already excluded. Further, it was contended that the words "any contract whatsoever" in sub-s. 2 did not include tenancy contracts at all, for that if they did one would be faced with this difficulty, that on the one hand the Court is empowered to annul or suspend the contract as it thinks fit, and on the other hand has to take cognizance of the fact that the Legislature has itself provided in s. 2 for what is to be done with respect to the very contracts against which the Court is asked to give relief in s. 1, sub-s. 2. In my opinion, neither of those contentions is sound. I do not think that because the two Acts are to be read together one is forced to the conclusion that s. 1, sub-s. 2, of the later Act cannot be read as applying to post-war contracts of tenancy at a rent of over 50*l.* Sect. 1 of the earlier Act no doubt provided for relief against such contracts only in the event of their having been made before the war. But the reason for affording relief exists just as much in the case of a contract of tenancy entered into after the war where the difficulty of carrying out the contract arises from restrictions imposed by the Government after the contract was entered into. In both cases the tenant has been placed in a position of difficulty by reason of unforeseen circumstances which have arisen in consequence of the outbreak of war, and I cannot see any reason why the Legislature should not have intended to apply the scheme of relief to the one class of tenants just as much as to the other. With regard to Mr. Schiller's second argument that s. 2 expressly provides that if by reason of restrictions of this kind a tenant is unable to carry out his contract he shall not be liable to any mandatory order or injunction or to pay any sum of money or incur any forfeiture, and that it would be unreasonable to suppose that the Legislature having thereby provided that the contract, although broken, shall

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be left in force, should give the Court power to order that the contract shall be suspended or annulled, it is to be observed that s. 2 only applies to a limited class of breaches of a contract of tenancy; but to that extent there is admittedly a difficulty. But there are many ways in which I think that difficulty can be dealt with, though I am not now concerned to define them. I see no ground on that account for refusing to give effect to the plain terms of s. 1, sub-s. 2. The words "any contract whatsoever" in my opinion mean what they say. I therefore decide the preliminary point of law in favour of the defendant and the third party. I will only add that I am by no means satisfied that, looking at the substance of this agreement, it is correct to say that it is a contract of tenancy within the meaning of s. 2 of the Act of 1917. It is true the defendant was a tenant at will, and therefore in one sense a tenant, but I am not sure that the words "contract of tenancy" in s. 2 do not relate to contracts under which a term of years is vested in the tenant, which was not the case here. However, it is not necessary for me to decide that point.

Judgment for the defendant and third party.

Solicitors for plaintiffs: *Dawes & Sons.*
Solicitors for defendant: *Boodle, Hatfield & Co.*
Solicitor for third party: *T. C. Summerhays & Son.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.

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March 18, 20, 21, 22, 25, 26; *April* 10, 11, 12; *May* 6.

GUARANTY TRUST COMPANY OF NEW YORK *v.* HANNAY & CO.

[1914 G. 1661.]

Bill of Exchange—Forged Bill of Lading attached thereto—Presentment for Acceptance by Holder in due Course—Warranty of Genuineness of Bill of Lading—Representation—Right to recover back Money paid by Acceptor—Mistake of Fact—Failure of Consideration.

The defendants, who carried on business in Liverpool, purchased cotton from dealers in the United States, who drew a bill of exchange on the defendants' bank in Liverpool for the price in the following form: "Sixty days after sight this first of exchange (second unpaid) pay to the order of ourselves 1464*l.* 9*s.* 0*d.* value received, and charge the same to account of $\frac{100}{\text{R.S.M.I.}}$ bales of cotton," and issued that bill in the United States. The plaintiffs, who were dealers in foreign bills of exchange in New York, in good faith purchased the bill of exchange with the bill of lading of the cotton attached, and sent the documents to the defendants' bank in Liverpool, who by arrangement with the defendants accepted the bill and paid it at maturity. The bill of lading was a forgery, and no cotton had been shipped under it. The defendants, on discovery of the fraud, brought an action in America against the plaintiffs to recover back the amount of the bill so paid by them. The plaintiffs then brought this action in England, claiming declarations that they did not, by presenting the bill for acceptance with the bill of lading attached, warrant or represent that the bill of lading was genuine, and that they were not bound to repay the amount of the bill:—

Held, that the plaintiffs did not, by presenting the bill of exchange for acceptance, warrant or represent the bill of lading to be genuine, and that the defendants were not entitled to recover back the money paid to the plaintiffs.

Leather v. *Simpson* (1871) L. R. 11 Eq. 398 and *Baxter* v. *Chapman* (1873) 29 L. T. 642 approved.

Decision of Bailhache J. [1918] 1 K. B. 43 on this point affirmed. (1)

APPEAL from the judgment of Bailhache J. (2)

The following statement of the facts is taken from the judgment of the learned judge:—

(1) The judgment of Bailhache J. was, however, reversed upon another point, namely, on the question of American law.

(2) [1918] 1 K. B. 43.

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"On February 1, 1910, the defendants, who are cotton brokers at Liverpool, bought of Messrs. Knight, Yancey & Co., who were shippers of cotton carrying on business at Decatur, Alabama, through the Cotton Commission Company, 1000 bales of cotton on c.i.f. terms. The contract is in writing, and one of its clauses runs: 'Reimbursement by shippers' drafts upon the Bank of Liverpool, Limited, payable London at sixty days' sight for invoice amount. The buyer guarantees the due protection of the drafts on presentation and payment at maturity.' It is agreed that under the form of contract it was the duty of the defendants upon the arrival of the documents—namely, the draft, the bill of lading, the policy or certificate of insurance, and the invoice—at Liverpool to procure the acceptance of the draft by the Bank of Liverpool if upon examination the documents proved to be in order. In pretended part performance of this contract the shippers purported to hand to the Louisville and Nashville Railway Company for carriage to Liverpool 100 bales of cotton and to procure a through bill of lading therefor dated February 10, 1910. By the terms of the bill of lading the cotton was deliverable 'to shippers' order, Liverpool, England.' The bill of lading was a forged document, and the shippers were the forgers. On the same day Knight, Yancey & Co. drew upon the Bank of Liverpool a draft for 1464*l.* 9*s.* at sixty days' sight for the contract price of the 100 bales of cotton. The draft is set out in paragraph 3 of the points of claim, and runs thus: 'Sixty days after sight this first of exchange (second unpaid) pay to the order of ourselves fourteen hundred and sixty four pounds and nine shillings value received, and charge the same to account of $\frac{100}{\text{R.S.M.I.}}$ bales of cotton.' The points to be noted are that the draft contained in the margin the date of the sale contract and a reference to the quality of the cotton, F.M.T. (fair middling tinged), and that it had in the body of the document the words 'value received and charge the same to account of $\frac{100}{\text{R.S.M.I.}}$ bales of cotton.' The letters R.S.M.I. purport to be the marks upon the bales. The draft was indorsed by Knight, Yancey & Co., as also was the bill of lading. As no question arises in this case with reference to the certificate of insurance or the invoice, I make no further mention of them. Messrs. Knight, Yancey & Co. delivered the draft and bill of lading to their bankers, the First National Bank of Decatur. They then

proceeded to sell the draft in New York. To this end they employed a broker there, Mr. Frederick Van Gerpen, who had acted as their broker for some years and in many transactions of the like nature. The modus operandi in all these transactions was the same as in this instance and was as follows: Knight, Yancey & Co. telegraphed to Van Gerpen instructions to sell the draft. He went into the market and found a buyer, in this case the plaintiffs, whose business is the buying of foreign exchange. This, as I understand, means the purchase at their present value of drafts payable at a future date in a foreign country. The contract made by Van Gerpen with the plaintiffs is evidenced by a memorandum sent to him by the plaintiffs in these terms: 'Bill of Knight, Yancey & Co., Decatur, Alabama, on Bank of Liverpool, Ltd., Liverpool, against 100 bales of cotton payable in London at sixty days' sight. Documents against acceptance. Rate 4.8778. To be mailed promptly by F. Van Gerpen, brokers.' In order to obtain immediate payment for the cotton and to enable Mr. Van Gerpen to effect the sale of the draft on the Liverpool bank and make delivery of the documents in New York Messrs. Knight, Yancey & Co. drew upon Mr. Van Gerpen on February 10, 1910, a draft payable to the cashier of the bank at Decatur. This draft upon Van Gerpen was discounted by the Decatur bank, and Knight, Yancey & Co. were credited with the proceeds. The Decatur bank sent the draft on Van Gerpen, together with the draft on the Liverpool bank with the shipping documents attached, to their New York agents, the Hanover National Bank. Mr. Van Gerpen paid this bank the amount of the draft upon him and got the documents from the bank on February 14, 1910, handed them to the plaintiffs, received a cheque for the price of the draft, and advised Messrs. Knight, Yancey & Co. of what he had done, and this part of the transaction was complete. These details are unnecessary except to emphasize the fact that Van Gerpen and the plaintiffs are dealers in exchange and not in cotton. Mr. Max May, one of the vice-presidents of the plaintiff company, says at p. 226 of the American record: 'Our company does not buy and sell cotton. It deals exclusively in bills of exchange. When we buy a bill of exchange with documents attached, whether warehouse receipts or bills of lading, the documents serve as temporary security until the bill of exchange is accepted by the bank drawn upon.' The plaintiffs

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having bought this bill of exchange sent it with the bill of lading to Liverpool for acceptance under cover of a letter to the Bank of Liverpool dated February 15, 1910, which, so far as is material, runs: 'We beg to enclose for favour of your procuring acceptance and transmitting for our account to the Guaranty Trust Company of New York, 33, Lombard Street, London, the bills noted at foot. In case of refusal to accept we will be obliged by your having the bills noted and communicating with our London office respecting them.' Then follows a list of bills, including the one in question. The Bank of Liverpool had an arrangement with the defendants under which they accepted, as agents for the defendants and on their behalf, drafts such as the present upon business terms, and on receipt of the documents from America the Bank of Liverpool sent their usual communications to the defendants requesting them to call and inspect the documents at once so that the draft, if in order, might be accepted without delay. The defendants called, inspected the documents, found them to be apparently in order, and instructed the bank to accept the draft by letter of February 23, 1910. Up to this time the bill of lading had been physically attached to the draft. Upon acceptance the Bank of Liverpool detached and kept the bill of lading, and under cover of a letter of February 24, 1910, sent the draft now duly accepted to the plaintiffs' London house as instructed. The acceptance was sold by the plaintiffs, passed through one or two hands, and ultimately on April 27, 1910, the Bank of Liverpool honoured their acceptance by payment to the London City and Midland Bank, the then holders. Some suspicions had been aroused as to the genuineness of the bill of lading before the acceptance was met, but the Bank of Liverpool felt themselves unable on that account to refuse payment. Having paid, they debited the defendants with the amount, with the result that on this particular transaction the defendants have lost 1464*l.* I regret to say that this is only one transaction, that there were many of the same class, and the total losses have been very large.

"Upon this state of facts, the defendants, Messrs. Hannay, brought an action in New York against the plaintiffs, the Guaranty Trust Company, claiming payment of the aforesaid sum of 1464*l.* upon three grounds—(*a*) warranty by the Guaranty Trust Company that the bill of lading was genuine and that the cotton therein described

had been shipped; (*b*) a representation by them to the same effect; (*c*) mistake of fact, namely, genuineness of the bill of lading and shipment of the cotton under it. To the complaint the Guaranty Trust Company demurred. The demurrer was heard by Noyes J. and was overruled." (1) Bailhache J. then stated that Noyes J. held that the draft and acceptance was conditional, and for that reason he overruled the demurrer, but gave leave to the Guaranty Trust Company to file a further answer to the complaint. The case then came on for hearing, but the judge who tried it held that he ought not to differ from Noyes J. and directed a verdict for Messrs. Hannay. This judgment was reversed by the United States Circuit Court of Appeals upon the ground that the case was governed by English law. (2) The Guaranty Trust Company thereupon brought this action and claimed: "A declaration that on the true construction of the document set out in paragraph 3 hereof the document was an unconditional draft, and was a bill of exchange within the meaning of the Bills of Exchange Act, 1882. A declaration that upon its true construction the acceptance set out in paragraph 9 hereof is an unconditional acceptance. A declaration that the plaintiffs, by presenting the said draft for acceptance with the bill of lading and insurance certificate attached, as set out in paragraph 8 hereof, did not warrant the genuineness of the said bill of lading by the law of England. A declaration that the facts set out in paragraphs 1 to 4 hereof do not disclose any liability by the plaintiffs to the defendants by the law of England." The defendants counterclaimed for a declaration that the plaintiffs were liable to pay to them the 1464*l.* with interest, or to indemnify the defendants against the loss sustained by them in consequence of the payment of the draft in question by the Bank of Liverpool. At the trial the grounds upon which the counter-claim was based were that the plaintiffs, in sending the draft and bill of lading to the Bank of Liverpool and requesting them to accept the draft, (*a*) warranted the genuineness of the bill of lading; (*b*) represented the bill of lading was genuine; (*c*) undertook to indemnify the defendants against loss if the bill of lading was not genuine; (*d*) failure of consideration, whereby the moneys paid by the Bank of Liverpool to the holders in due course became moneys had and received by the plaintiffs for the use of the

1) (1911) 187 Fed. Rep. 686. (2) (1913) 210 Fed. Rep. 810.

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defendants or moneys paid by the defendants to the use of the plaintiffs at their request; (*e*) that the contract constituted by the acceptance was entered into under a mistake of fact common to both parties. During the hearing the defendants desired to amend their defence, and by leave they did so. The amendment read thus: "The defendants will further contend that under the law of England the validity and form of the said draft and the interpretation thereof and the rights acquired by the plaintiffs by the transfer and indorsement to them thereof depend on American law, and that by the said law the said draft was a conditional draft and was not a bill of exchange or a negotiable instrument. The American law has been so decided between the plaintiffs and the defendants by a judgment of Noyes J. in the suit between the parties referred to in the points of claim, which judgment operates as an estoppel between the parties."

The action was tried in the first place before Bailhache J. and a special jury, when the following question was put to the jury: Did the plaintiffs in sending the draft for acceptance by the Bank of Liverpool, accompanied by the bill of lading, and under the circumstances proved in this case, warrant the genuineness of the bill of lading? The jury answered No. The jury were then discharged, and the rest of the case was heard before Bailhache J. without a jury. The learned judge held that the question whether the bill of exchange was conditional or not had, under s. 72, sub-s. 1, of the Bills of Exchange Act, 1882, to be determined by American law; that by that law the bill was conditional; and that the defendants were entitled to recover the money back. He accordingly gave judgment for the defendants. The plaintiffs appealed.

Gore-Browne K.C., D. M. Hogg K.C., Hon. M. M. Macnaghten, and *Cassie Holden* for the plaintiffs.

Langdon K.C., Greer K.C., H. Jacobs, and *A. R. Kennedy* for the defendants.

Cur. adv. vult.

May 6. PICKFORD L.J. read the following judgment:—The appeal in this case arises out of some extensive cotton frauds committed by a firm of Knight, Yancey & Co., of Decatur, Alabama. The particular transaction in question is a pretended sale of 100 bales

of cotton by Knight, Yancey & Co. to the defendants in this action. The 100 bales were a part of a quantity of 1000 bales sold c.i.f. Liverpool to be paid for by the sellers' drafts upon the Bank of Liverpool. The plaintiffs became holders of the draft, to which was attached a bill of lading for the 100 bales, and presented it to the Bank of Liverpool for acceptance. The bank accepted the draft, retaining the bill of lading, and paid the money on the due date to the London City and Midland Bank, who had become holders of the document after acceptance. The bill of lading had been forged by Knight, Yancey & Co., and no cotton had been shipped by them as described in it, or corresponding to the description of cotton in the bill of lading. The defendants repaid to the Bank of Liverpool—who had accepted the draft by agreement with them—the amount paid by them, and then sued the plaintiffs to recover the amount on grounds afterwards to be mentioned.

The facts are stated in detail by Bailhache J. with such care and accuracy that I think it would be useless to repeat them, and I adopt his statement (1) as part of this judgment. It is, however, necessary to mention that we were told by the appellants' counsel that the statement that it was conceded that if the acceptance were conditional, i.e., not a negotiable instrument, the defendants were entitled to have their money back was a misapprehension on the part of the learned judge, and that it was not intended to make any such concession. They contended before us that, even assuming the document to be conditional and not negotiable, the defendants were not entitled to recover the amount on the following grounds. The money was not paid by the defendants, but by the Bank of Liverpool, and it was not paid to the plaintiffs, but to the London City and Midland Bank, who received it, not as the plaintiffs' agents, but by reason of a purchase of the bill after acceptance. If the document were not negotiable then, the plaintiffs contended, the bank were not liable upon it, and could avail themselves of any defence which would be good against Knight, Yancey & Co. Before payment by the bank it had come to their knowledge and that of the defendants that the bill of lading was probably forged, and the defendants had instructed the bank not to pay the money. The bank, however, declined to dishonour their own acceptance, and paid

(1) [1918] 1 K. B. 44–50.

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the money. It was contended that in these circumstances the defendants were not bound to indemnify the bank, and that their doing so was a voluntary payment and no action would lie against the plaintiffs to recover the amount from them. It was also contended that, whether the bank were liable to pay the London City and Midland Bank or not, and whether the defendants were liable to indemnify the bank or not, the defendants had no right to be reimbursed by the plaintiffs because the money was not paid to them or at their request, and there was no contract existing between the plaintiffs and the defendants which gave any right to such reimbursement. These contentions are not mentioned by Bailhache J., and were probably not raised before him. As I have mentioned, he considered that the liability of the plaintiffs in these events was conceded, but, after inquiries from the counsel for both parties, I think there was nothing in the conduct of the case below to preclude the plaintiffs from raising these contentions before us.

I shall now deal with the points raised before Bailhache J. and reserve these contentions till later. The first question is whether the defendants can recover this money assuming the case to be governed by English law. I agree with Bailhache J. that the document was by English law a bill of exchange and negotiable, and that neither the draft nor the acceptance was conditional according to our law. Assuming this, the defendants contend that they are entitled to succeed on one or all of the following grounds: (*a*) that the plaintiffs warranted the genuineness of the bill of lading; (*b*) that they represented that it was genuine; (*c*) that they undertook to indemnify the defendants if it were not genuine; (*d*) failure of consideration, which entitled the defendants to recover the money as moneys had and received by the plaintiffs to the use of the defendants or paid by the defendants to the use of the plaintiffs at their request; (*e*) a mistake of fact by both parties which induced the bank as the defendants' agents to accept the bill. Bailhache J. held that both on principle and authority all these grounds of claim failed, and I agree with him.

So far as warranty, representation, and undertaking to indemnify are concerned, the case is governed by *Leather* v. *Simpson* (1), a decision of Malins V.-C. in 1871, and *Baxter* v. *Chapman* (2), a deci-

(1) L. R. 11 Eq. 398. (2) 29 L. T. 642.

sion of Bacon V.-C. in 1873. These cases are decisions of a Court of first instance, and are open to review in this Court, but they have remained unquestioned now for over forty years, have been quoted in text-books as authorities, and have no doubt been guides in the conduct of many important mercantile transactions. I should therefore be much disinclined to interfere with them even if I disagreed with their conclusions, but on examining them I am of opinion that the decisions are quite right, though perhaps some of the reasoning in the former may be open to criticism. Knight, Yancey & Co. had sold the cotton to the defendants on the terms that payment was to be made by sixty days' draft on the Bank of Liverpool. In order to carry out that transaction and to put themselves in funds, they sold the draft to the plaintiffs and handed over with it the bill of lading. There was probably also some document as to insurance and an invoice, but this is immaterial. The object of handing over the bill of lading or attaching it to the draft was to enable the plaintiffs to hand it to the bank on acceptance and also to give the plaintiffs a security in case of a refusal to accept. The plaintiffs, however, to use the words of Bailhache J. (1), bought the exchange, not the cotton, and they acquired no property in the bill of lading or the goods represented by it except so far as was necessary to secure them during the period between the purchase of the draft and its acceptance. On acceptance their interest in the bill of lading ceased to exist, and the special property which they had in it was not transferred to the bank but extinguished. The property in the cotton and the right to the bill of lading then passed to the bank or the defendants, not by reason of any contract between the plaintiffs and the bank or the defendants, but by reason of the original contract of sale between Knight, Yancey & Co. and the defendants, the bank's principals. I doubt if the presentation of the draft for acceptance was a request by the plaintiffs to the bank at all; it may well be only an inquiry as to whether they were going to perform the contract of their principals with Knight, Yancey & Co. by accepting the draft. The position of the holder of a bill of exchange who presents it for payment is, I think, well expressed in a lecture by Dean Ames, of Harvard, in the *Harvard Law Review*, vol. 4, pp. 297, 302, republished in Ames' Lectures on Legal

(1) [1918] 1 K. B. 51.

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History, p. 270, where he says: "The attitude of the holder of a bill who presents it for payment is altogether different from that of a vendor. The holder is not a bargainor. By presentment for payment he does not assert, expressly or by implication, that the bill is his or that it is genuine. He, in effect, says: 'Here is a bill, which has come to me, calling by its tenor for payment by you. I accordingly present it to you for payment, that I may either get the money, or protest it for non-payment.' Mr. Justice Chambre's statement (1), that the holder warrants the genuineness of the bill by presenting it, was expressly repudiated by Littledale and Bayley JJ. in *East India Company* v. *Tritton*." (2) He is no doubt in that passage speaking of the question of whether there is a representation as to the genuineness of the bill of exchange, but I think the statement as to the position of the holder in such a case applies equally to the question whether there is a representation as to the bill of lading. But if it were a request, it was only a request to them to perform that contract, and such a request did not impose any liability upon the plaintiffs. It was not in any way such a request as those in the cases of *Sheffield Corporation* v. *Barclay* (3) and *Bank of England* v. *Cutler* (4): see *Moel Tryvan Ship Co.* v. *Kruger & Co.* (5) I can see nothing in these circumstances to afford evidence of warranty or representation or undertaking to indemnify, and it is admitted that there was no express agreement by the plaintiffs on any of the points, and that it must arise, if at all, by a necessary implication from the circumstances. I think that the cases which negatived such an implication were rightly decided, and that the defendants' case on those heads fails. If it were a question of fact, the point of warranty is found against the defendants by the verdict of the jury.

The head of failure of consideration raises very much the same point. There was no intention that any consideration should in the circumstances pass from the plaintiffs to the defendants, and I think this part of the case is concluded by the decision of *Robinson* v. *Reynolds*. (6) This is the decision of a Court of Appeal and binding

(1) In *Smith* v. *Mercer* (1815) 6 Taunt. 76, 83, 84.
(2) (1824) 3 B. & C. 280, 289, 291.
(3) [1905] A. C. 392.
(4) [1908] 2 K. B. 208.
(5) [1907] 1 K. B. 809, 825.
(6) (1841) 2 Q. B. 196.

on us, but apart from this I entirely agree with the decision. I think that the same authority practically disposes of the contention of mistake of fact in the contract of acceptance. Both parties, no doubt, thought that the bill of lading was genuine and both were innocent in the transaction, and it was for the defendants as the bank's principals to satisfy themselves as to the genuineness of the bill of lading, and not for the plaintiffs, as is shown by the correspondence between them before acceptance. There was, in my opinion, no such mistake in fact as to entitle the defendants to throw the loss occasioned by the fraud of their vendors upon the plaintiffs.

There remains, however, the question of how far the case is affected by American law. If the document be an unconditional order and acceptance and so a negotiable instrument, it is not contended that American law applies to the case, and indeed such a contention would be useless, since American law in that case is the same as our own: see *Springs* v. *Hanover National Bank* (1) and the cases there cited. But it is contended by the defendants that the meaning of the draft must be ascertained according to American law because it was issued in America, and that when its meaning has been so ascertained it is shown to be only a conditional order and therefore not a negotiable instrument. To support this contention they refer to the Bills of Exchange Act, 1882, s. 72, which is in these terms: "Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows: (1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made. Provided that—(*a*) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; (*b*) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom. (2.) Subject to the provisions of this Act, the interpre-

(1) (1913) 209 N. Y. 224.

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tation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made." To deal with the effect of this section it is necessary to refer to s. 2 and s. 3, sub-ss. 1 and 2, of the same Act. Sect. 2 defines "acceptance," "bearer," "bill," "delivery," "holder," "indorsement." Sect. 3, sub-s. 1, provides: "A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer." Sub-s. 2: "An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange." This draft was issued either in Alabama or New York; I think it is immaterial in which State, for all the evidence is to the effect that the law is the same in both, and that is not affected by the fact, if it exist, that there are conflicting decisions in the two States.

The argument for the defendants proceeds upon the ground that one requisite of form is that there shall be an unconditional order, that this depends upon the meaning of the words used as governed by the law of the place of issue, and that in America the meaning of the words is such as to make the order conditional. The plaintiffs contend that on the true construction of s. 72, sub-ss. 1 and 2, the meaning of the draft is to be ascertained according to English law, and that American law does not apply. The construction of this section is difficult: see Dicey on Conflict of Laws, 2nd ed., pp. 588, 593, referring to Story on Bills of Exchange, ss. 153, 154, and Chalmers on Bills of Exchange, 7th ed., p. 266. But I will assume without deciding that the question whether the draft is conditional is to be answered according to American law. In view of the conclusion at which I have arrived in the case the question of whether the draft and acceptance were conditional or unconditional is immaterial, but considerable argument was addressed to us on the point, and, therefore, I think it well to express my opinion upon it.

In considering the matter it is, I think, necessary to keep quite distinct two questions: (1.) Was the drawee entitled as a condition of his acceptance to possession of the bills of lading with or without

a warranty as to their genuineness ? (2.) Was the draft which he accepted an order dependent for its fulfilment upon a condition ? I do not think these two questions have been kept sufficiently distinct by some of the witnesses, or in some of the arguments and cases. It is quite probable that by virtue of the contract between the drawer and drawee (who were vendor and purchaser) it was a condition of acceptance that the bills of lading should be handed over, and yet that the order to pay contained in the draft and accepted by the drawee should be unconditional. This point has to be determined according to the conditional or unconditional nature of the draft alone. Some difficulty is occasioned in the consideration of this question by the uncertainty in which the matter is left as to the nature of the condition which is said to be contained in the draft. The only condition mentioned in the Bills of Exchange Act, 1882, or the Negotiable Instruments Law of Alabama or New York is a condition that the amount ordered to be paid should be paid out of a particular fund. The provisions are as follows : The New York Negotiable Instruments Law, s. 210, defines a bill of exchange as " an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer " ; and with regard to condition it provides (s. 22) when a promise is unconditional : " An unqualified order or promise to pay is unconditional within the meaning of this chapter though coupled with : 1. an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount ; or 2. a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional." The law of Alabama defines an unconditional promise to pay in this way : " An unqualified order or promise to pay is unconditional within the meaning of this chapter, though coupled with (1.) an indication of a particular fund out of which reimbursement is to be made, or particular account to be debited with the amount ; or (2.) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional." So with a slight variation in language the law of the two States is the same and is the same as the

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English law. This definition of a conditional order is, of course, not exhaustive, and there may be other conditions. This, however, is the one which is referred to in nearly all the American cases to which we were referred and is mentioned by Bailhache J. as if it were the one he was considering. The passage is as follows (1): "The defendants say that the draft sold to the plaintiffs and accepted by the defendants is not regarded in America as a negotiable instrument, but as a conditional order or assignment of a fund." In his final conclusion (2) he does not state the nature of the condition. Some of the witnesses called for the defendants were by no means certain of the condition which they said existed (Mr. Tompkins, pp. 33, 34, 35, of the evidence taken on commission in New York, and Mr. Conlen, p. 52). Noyes J. (3), who decided that the draft was conditional, does not define the condition further than by saying that the draft was drawn against the cotton. This is an expression which I think, with respect, is somewhat lacking in precision. It may mean that the draft is only to be paid out of the proceeds of the cotton; it may mean that there is an undertaking that the bill of lading is genuine; and it is often used to mean no more than that the draft is drawn to carry out a cotton transaction, and is not a finance or accommodation draft. I think an examination of the evidence in this case shows that the last was the meaning which the witnesses attached to these words. The expression is often used with this meaning by commercial men and also by judges: see *Craig* v. *Sibbett* (4), *Brown, Shipley & Co.* v. *Kough* (5), *Amsinck* v. *Rogers* (6), and other cases. I think that Noyes J. was using it in the first sense, but it does not appear clearly in his judgment. I fail to see how this first meaning can attach to a draft drawn as this was by a vendor on a purchaser to pay for cotton sold by the former to the latter, and for this purpose I do not think it makes any difference whether the draft is payable at sight or after a specified number of days. If the goods sold are not delivered but the money is paid at once, the matter is clearer, but if they are sold on credit for the number of days mentioned in the draft, it only

(1) [1918] 1 K. B. 54.
(2) Ibid. 62.
(3) *Hannay* v. *Guaranty Trust Co. of New York*, 187 Fed. Rep. 686.
(4) (1851) 15 Pa. 238.
(5) (1885) 29 Ch. D. 848, 855.
(6) (1907) 189 N. Y. 252.

establishes that the buyer hoped, and perhaps expected, to receive the goods and realize them, and so put himself in funds to pay the draft. It cannot mean that the draft is only to be paid out of the proceeds, for, if so, the vendor, and not the purchaser, is exposed to the risks of the market. If there were a heavy fall in the market, he would on this construction be paid, not the contract price of the cotton, but the amount realized after the fall in the market. This is altogether inconsistent with the transaction. The same considerations apply to a draft drawn for advances against cotton. Probably from these considerations the learned counsel for the respondents did not contend that the condition in this case was that the draft should be paid out of the proceeds of the cotton, but stated it as being a condition that the drawee should receive a genuine bill of lading and insurance certificate for cotton corresponding to the marks and description of the cotton mentioned in the draft. For the points I am now considering it is essential to remember that the question is whether the condition alleged is to be found in the words of the draft. It matters not whether in construing the draft regard is had to surrounding circumstances or not; the question is, whether in the draft itself there is this condition.

According to the contention of the defendants' counsel, the condition is to be found in the words "charge the same to account of $\frac{100}{\text{R.S.M.I.}}$ bales of cotton," and the mention of the sale date and quality of the cotton in the margin. This, they say, should be read as meaning, not "pay to the order of ourselves out of the proceeds of the cotton mentioned," this meaning they expressly disclaimed, but "pay to the order of ourselves provided that the bill of lading of the cotton mentioned herein is genuine and represents actual cotton"; and this must be found in the terms of the draft itself, which, it may be noticed, does not mention the bill of lading at all. This makes the examination of the American law in this case rather difficult, for on examination I think it will be found that the witnesses directed their evidence to the question of the condition first mentioned, i.e., was the order to pay out of a particular fund or out of the drawee's assets with a right of recoupment, rather than to the condition for which the defendants now contend. It also appears, in my opinion, that with the exception of the very special acceptance in *Guaranty*

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Trust Co. of New York v. *Grotrian* (1) the decision in every American case cited to us dealt with the first mentioned condition. American law is a question of fact, and evidence was called on both sides of gentlemen of position and authority as American lawyers. After a careful consideration of their evidence I have no hesitation in preferring the evidence of the witnesses called for the plaintiffs to that of the witnesses called for the defendants. I think it is clearer, more logical, and more satisfactory in the treatment of the cases cited. If, therefore, the decision turned upon the evidence of these witnesses alone, I should have no difficulty in deciding that by American law this draft was unconditional and a negotiable instrument. But there is an additional circumstance of weight which it is necessary to consider. In the litigation between the parties in America, which has been mentioned, Noyes J., sitting as a judge of the Circuit Court of the United States for the Southern District of New York (2), decided on demurrer that this draft was conditional, as I have already stated, but without making clear what condition existed, and it is said that this decision has been approved by the New York Court of Appeals in the case already mentioned of *Springs* v. *Hanover National Bank* (3), and in the decision in this case—*Guaranty Trust Co. of New York* v. *Hannay* (4)—of the United States Circuit Court of Appeals granting a new trial. The witnesses for the plaintiffs have given evidence that this decision of Noyes J. is incorrect in American law and inconsistent with other authorities. The defendants' witnesses have given evidence to the contrary, and both have cited authorities in support of their respective contentions. It seems to me that we must consider whether in our opinion this decision was correct, and must consider it as a question of fact upon the evidence. If this were not so, evidence as to foreign law would be useless wherever there was a decision of any foreign judge on the point, and our Courts could only follow that decision as a binding authority. This is not the position of our Courts in such a matter. It may be that we have, strictly speaking, the same power to consider a decision of the ultimate Court of Appeal, but I cannot imagine that an English Court would hold a decision of the final Court of Appeal in the State of New York

(1) (1902) 114 Fed. Rep. 433.
(2) 187 Fed. Rep. 686.
(3) 209 N. Y. 224.
(4) 210 Fed. Rep. 810.

erroneous according to the law of that State. We must, however, give our opinion on the decision of Noyes J. The first noticeable fact is that according to the report the decision was not based on any independent reasoning by the learned judge, but solely upon the authority of two cases from which he cites passages. He does not mention the Negotiable Instruments Law and consider whether this draft does more than indicate a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount or a statement of the transaction which gives rise to the bill, and whether the enumeration of the marks, &c., of the cotton and the date of sale do more than identify the goods in respect of which the transaction has taken place. It is clear, I think, from this position that if the authorities on which the learned judge relies do not establish the proposition in support of which he uses them, very much of the authority of his decision is gone. I agree with what I think was the conclusion of Bailhache J. that these authorities do not establish the proposition that there was any condition contained in the draft, still less that there was the condition with which we now have to deal. The decisions in the cases cited, *National Bank* v. *Merchants' Bank* (1) and *Guaranty Trust Co. of New York* v. *Grotrian* (2), do not establish it, and the passages cited are merely dicta, though dicta of high authority if this point was really considered by the Court. The first passage is from the language of Strong J. in delivering the judgment of the Supreme Court of the United States in *National Bank* v. *Merchants' Bank* (3), and it is as follows: "Moreover . . . . the drafts upon their face showed that they had been drawn upon the cotton covered by the bills of lading. Both the plaintiffs, and their agents the defendants, were thus informed that the bills were not drawn upon any funds of the drawers in the hands of Green & Travis, and that they were expected to be paid out of the proceeds of the cotton." This must, however, be considered in relation to what the Court was deciding, i.e., that when a draft is to be accepted against a bill of lading the acceptor is entitled to have the bill of lading delivered to him on so accepting, and that therefore the plaintiffs could not complain that the defendants, their agents, so handed it over. Strong J. later

(1) (1875) 91 U. S. 92. (2) 114 Fed. Rep. 433.
(3) 91 U. S. 94, 95

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on points out that a draft such as that under consideration represented either a sale on credit to the extent of the period named in the draft, or an advance for the same time against the cotton, and that in either case part of the bargain was that on acceptance the purchaser or the person making the advance was to have control of the goods. In this connection the words cited are perfectly apt, because the object of obtaining credit was to enable the purchaser to put himself in funds to meet the acceptance by realizing the goods before the time of credit expired, but I do not think that Strong J. ever meant to say that the vendor was thereby confined to the proceeds of the resale, or that the expectation to which he refers imported any condition in the draft that the bill of lading was genuine. In fact he had not this point in any way before his mind. In the case of *Guaranty Trust Co. of New York* v. *Grotrian* (1) the draft and acceptance were as follows: "Sixty days after sight of this first (second unpaid) pay to my order in London 1518*l.* sterling, value received, and charge the same to account of 8417 bush. flax seed." "Accepted payable at Lloyds Bank, Limited, London, against indorsed bills of lading for 8417 bushels of flax seed per *Buffalo* s.s. at New York and certificate of insurance $8500." The decision was that the acceptance was conditional, as it clearly was, but Townsend J., in delivering judgment, used the words cited by Noyes J. (2)—"The request to pay was conditioned upon the delivery of the flax seed." They were quite unnecessary to the decision, and if correctly reported must, I think, have been used inadvertently, as the written arguments for the plaintiffs in that case admitted that if the acceptance had been a simple acceptance the action could not have been maintained (see exhibits in the appendix in this case, pp. 20 and 25); and the Court, immediately after the passage cited by Noyes J., goes on to say that if the acceptance had been unconditional the party having the money should retain it. The action was by Grotrian & Co. to recover back money which they had paid to the Guaranty Trust Company, and the ground of the action was that the bills of lading against which by the acceptance payment was to be made were not genuine. These dicta do not therefore, when examined, really support the decision of Noyes J., and, as it is entirely rested on them, it has not the

(1) 114 Fed. Rep. 433. (2) 114 Fed. Rep. 436.

authority which would attach to it if it were founded on an independent consideration by the learned judge of the wording of the draft taken in relation to the provisions of the enactments as to negotiable instruments. It is therefore, I think, open to me to say with respect that, in the light of the evidence given as to American law and the cases cited, his decision does not correctly interpret the draft by American law.

The cases most relied upon by the defendants are those of *Lowery* v. *Steward* (1), *Brill* v. *Tuttle* (2), and *Hibbs* v. *Brown*. (3) Many other cases were cited, but these were the most important. In *Lowery* v. *Steward* (1) the document was in these words: "Please pay to the order of Archibald H. Lowery the sum of five hundred dollars on account of 24 bales cotton shipped to you, as per bill of lading, by steamer *Colorado*, inclosed to you in letter"; and the Court in considering the case took into consideration also a correspondence which had passed between the parties. In the light of all the circumstances they held the document a conditional order. They said (4): "The draft was not a bill of exchange requiring acceptance to bind the drawers, but a specific draft or order upon a particular fund. It was equivalent to an assignment in equity to Lowery & Co. of so much of the proceeds of the cotton." In *Brill* v. *Tuttle* (2) the words of the document were: "Pay Brill and Russell three hundred dollars and charge the same to our account for labour and materials performed and furnished in the repairs and alterations of the house in which you reside, in the village of Mohawk," and the Court, after considering *Lowery* v. *Steward* (1), laid down this test (5): "The question in all this class of cases is the same, and it must be determined according to the circumstances of each case. It is whether the draft is drawn upon the general credit of the drawee, or upon a particular fund": see also *Munger* v. *Shannon*. (6) They also said that there could be no doubt of the application of the rule, and held the document before them to be an assignment of the fund in the drawee's hands. The case of *Hibbs* v. *Brown* (3) is not important by reason of its own facts, but because Hiscock J., in delivering his judgment, cites, amongst other

(1) (1862) 25 N. Y. 239.
(2) (1880) 81 N. Y. 454.
(3) (1907) 190 N. Y. 167.
(4) 25 N. Y. 242.
(5) 81 N. Y. 462.
(6) (1874) 61 N. Y. 251, 255.

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cases, *Lowery* v. *Steward* (1) and *Brill* v. *Tuttle* (2) as existing authorities and says (3): "It seems as if no extended comment upon these cases were necessary to point out . . . . how clearly each instrument mentioned in them is an order upon, an assignment pro tanto of, a limited fund without any general credit or liability behind it." In the same case Werner J. says (4): "The cases referred to, as well as the statute"—that is the Negotiable Instruments Law of New York—"make it entirely clear that the mere indication of a particular fund from which the maker of an instrument may reimburse himself, or a mere reference to a specified account which is to be debited with the amount called for by the instrument, does not affect its unconditionality, and it is only where the order or promise is to pay out of a particular fund that it is considered conditional in such sense as to destroy the negotiability of the instrument." The defendants also relied upon *Lanfear* v. *Blossman* (5) and *La Fayette* v. *Merchants' Bank*. (6) In *Lanfear* v. *Blossman* (5) the decision was that the holder of a draft could not require acceptance without handing over the bill of lading. Any remarks that in any way support the defendants' contention were dicta, and seem to me to be founded on a confusion between the consideration for the acceptance and a condition in the draft, if indeed they bear the meaning alleged by the defendants. The document and facts in *La Fayette* v. *Merchants' Bank* (5) are so entirely different from those in this case that the case is no authority at all.

The most important cases upon which the plaintiffs relied were *Waddell* v. *Hanover National Bank* (7), where the document was, "On demand pay to the order of Jefferson Bank one thousand five hundred and no dollars 400 C/A.R.L. No. 3362—via A.R.L.B.L. direct. Value received and charge same to the account of Mound City Produce Co.," and an accompanying letter was also considered; and *Amsinck* v. *Rogers* (8), where the terms were, "On demand of this original cheque (duplicate unpaid) pay to the order of Rogers, Brown & Co. 2258*l.* 6*s.* 8*d.*

(1) 25 N. Y. 239.
(2) 81 N. Y. 454.
(3) 190 N. Y. 183.
(4) Ibid. 195.
(5) (1846) 1 La. Ann. 148.
(6) (1905) 73 Ark. 561; 108 Am. St. Rep. 71.
(7) (1905) 48 N. Y. Miscel. Rep. 578.
(8) 189 N. Y. 252.

payable at rate for bankers' cheques on London value received and charge the same to account of pig iron per s.s. *Quarnero*." In both these cases the order was held unconditional and the draft negotiable. It does not seem to have been argued in *Amsinck* v. *Rogers* (1), but Hiscock J., in delivering judgment, said (2): "There is no doubt, and in fact it is not denied by the learned counsel for the appellants, that it was a bill of exchange under the laws of the State of New York." They also cited a number of other cases in which similar words were held not to make the order conditional, e.g., *Whitney* v. *Eliot National Bank* (3), *Martin* v. *Brown, Shipley & Co.* (4), *Bank of Guntersville* v. *Jones Cotton Co.* (5), *Cosmos Cotton Co.* v. *First National Bank of Birmingham* (6), and *Schmittler* v. *Simon* (7); but I think it is sufficient to examine the two I have mentioned in comparison with those cited for the defendants in order to test the argument. It seems that the American Courts take into account the surrounding circumstances outside the terms of the document itself more than the English Courts, but, in whichever way these cases are looked at, the current of authority is, in my opinion, in favour of the draft in this case being unconditional and contrary to the decision of Noyes J. In *Lowery* v. *Steward* (8) it appears on the face of the draft that the order is to pay on account of certain bales of cotton shipped by the drawer to the drawee a sum of money to a third person, a stranger to the transaction between the drawer and the drawee, and this would naturally be construed to mean an order to pay out of that particular fund and not out of the drawee's general assets. On looking at the correspondence it became clear that this was the meaning. The document in *Brill* v. *Tuttle* (9) is still plainer. It showed that the drawer had done some work for the drawee for which the drawee would have to pay him, and directs the drawee to pay a third person, again a stranger to the transaction, a sum of money and charge it to the account of that work. The same inference would, it seems to me, be drawn in that case, i.e., that the money was to be paid out of

(1) 189 N. Y. 252.
(2) Ibid. 265.
(3) (1884) 137 Mass. 351.
(4) (1883) 75 Ala. 442.
(5) (1908) 156 Ala. 525.
(6) (1911) 171 Ala. 392.
(7) (1886) 101 N. Y. 554.
(8) 25 N. Y. 239.
(9) 81 N. Y. 454.

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that particular fund. In both *Waddell* v. *Hanover National Bank* (1) and *Amsinck* v. *Rogers* (2) the draft was in favour of the drawer and appeared to be for a sum due in payment for goods sold by the drawer to the drawee. This seems to me to be the inference from the draft, and the surrounding circumstances proved it to be the case. In such a case, for the reasons I have given before, payment out of the proceeds of the goods only is inconsistent with the transaction; the drawee, who is the purchaser, must pay the contract price out of his own assets, but he can reimburse himself, or, in the case of a sale on credit and a draft payable not at sight but in the future, put himself in funds by a resale of the goods. In the case before us for decision it seems to me fairly clear on the face of the document that it is a draft by a vendor on a purchaser in payment for cotton sold, and the sale date is given in the margin of the draft. If it be permissible according to the practice of the American Courts to look at the circumstances of the case, there is no doubt that this was the transaction. In my opinion, therefore, there is no inconsistency between *Lowery* v. *Steward* (3) and *Brill* v. *Tuttle* (4) or the other cases proceeding on similar grounds and the case under consideration, or those mentioned above as relied on by the plaintiffs, and this case properly falls within those where the orders are considered by American law as unconditional.

There still remains, however, the important question upon which Bailhache J. decided against the plaintiffs, i.e., whether the judgment of Noyes J. has been approved by the New York Court of Appeals in *Springs* v. *Hanover National Bank* (5) and in the decision of the United States Circuit Court of Appeals in granting a new trial in this case. (6) If that be the case I should, as I have said, feel myself bound to take it as an authoritative statement of the law by the highest tribunal in the State of New York, and should not feel myself at liberty to question it in an English Court.

A careful consideration of the former case has, however, led me to the conclusion that Bailhache J. is not accurate in stating that the decision of Noyes J. is quoted by the New York Court of Appeals as an authority for the point that this document was a conditional

(1) 48 N. Y. Miscel. Rep. 578.
(2) 189 N. Y. 252.
(3) 125 N. Y. 239.
(4) 81 N. Y. 454.
(5) 209 N. Y. 224.
(6) 210 Fed. Rep. 810.

order. Noyes J. dealt with two points: (1.) Assuming the draft was unconditional, could the plaintiffs in that case (the defendants here) recover?—and he held they could not. (2.) Was the draft conditional?—and he held it was. The Court of Appeals also dealt with the same two points in a different order: (1.) Was the draft in the case before them conditional?—and they held it was not. (2.) In that case could the plaintiffs there recover?—and they held they could not. There was no similarity whatever between the document before the Court of Appeals and that before Noyes J., and it is difficult to see how the decision on one could be of any assistance as to the other. The first question, however, stated by Noyes J. and the second decided by the Court of Appeals involved exactly the same considerations, and one decision was clearly relevant to the other. On the question whether the draft before them was conditional the Court of Appeals cited no authorities at all, and the only ground for suggesting that it was conditional was that the word "cotton" was lithographed or printed on the form. Having disposed of that question and another as to the conduct of the bank in a few words, Hiscock J. says (1): "Therefore in the end plaintiffs confront the general question as first stated." This he had stated as follows: "This case directly presents to this Court for the first time the question whether the drawee of a draft who has paid the same to a bona fide holder for value relying in part upon purported bills of lading attached by the drawer to the draft, but not mentioned therein, can, on discovery that the bills of lading are forgeries, recover back the moneys so paid from the payee or indorsee who has neither guaranteed the genuineness of the said instruments nor been aware of their fraudulent character." He then discusses this question and cites at some length the cases of *Hoffman & Co.* v. *Bank of Milwaukee* (2), *Goetz* v. *Bank of Kansas City* (3), and *First National Bank of Detroit* v. *Burkham.* (4) After discussing these three cases, the only ones which he had cited up to that time, he continues: "The principles affirmed by these decisions are supported directly or indirectly by the following cases," and then he cites among other cases *Robinson* v. *Reynolds* (5), *Thiedemann* v. *Goldschmidt* (6),

(1) 209 N. Y. 230, 232, 238.
(2) (1870) 12 Wall. 181.
(3) (1887) 119 U. S. 551.
(4) (1875) 32 Mich. 328.
(5) 2 Q. B. 196.
(6) (1859) 1 D. F. & J. 4.

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Leather v. *Simpson* (1), *Guaranty Trust Co.* v. *Grotrian* (2), *Hannay* v. *Guaranty Trust Co.* (3), and 2 Daniel's Negotiable Instruments, 4th ed., s. 1734d; and it is in this connection, and in this alone, that he cites the decision of Noyes J. It is to be noticed that that learned judge on this point had based his opinion on two of the same cases discussed by Hiscock J., i.e., *Hoffman & Co.* v. *Bank of Milwaukee* (4) and *Goetz* v. *Bank of Kansas City* (5), and that the case before him is cited by the Court of Appeals in conjunction with such cases as *Robinson* v. *Reynolds* (6) and *Leather* v. *Simpson* (1), plainly showing the point upon which it was cited. As I have already pointed out, the documents in the two cases were so different that I cannot see how the decision on one could be in any way relevant to the other, and I can find no trace in the report of that part of Noyes J.'s decision being in any way under the notice of the Court. Bailhache J. attaches importance to the fact that Hiscock J. delivered the judgment both in *Hibbs* v. *Brown* (7) and in *Amsinck* v. *Rogers* (8), and that in the former he cited *Lowery* v. *Steward* (9) and *Brill* v. *Tuttle* (10) as authoritative decisions, and therefore must have considered them not inconsistent with *Amsinck* v. *Rogers*. (8) For the reasons I have given above I do not think they are inconsistent by reason of the differences in the documents and circumstances in the different cases, but I think there is at any rate such an apparent inconsistency between *Amsinck* v. *Rogers* (8) and the decision of Noyes J. that if Hiscock J. had intended to approve the latter I should have expected him to distinguish one from the other or give some reason why he preferred the latter to his previous decision. The fact that he did not confirms my view that this point of Noyes J.'s decision was not really under his notice. I wish, however, again to point out that all these cases, whether consistent with one another or not, are concerned with the question whether the order was to pay out of a particular fund, and was therefore an equitable assignment of that fund or part of it, or whether it was a general order to pay, and have very little

(1) L. R. 11 Eq. 398.
(2) 114 Fed. Rep. 433.
(3) 187 Fed. Rep. 686.
(4) 12 Wall. 181.
(5) 119 U. S. 551.
(6) 2 Q. B. 196.
(7) 190 N. Y. 167.
(8) 189 N. Y. 252.
(9) 25 N. Y. 239.
(10) 81 N. Y. 454.

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bearing, if any, upon the question of the condition alleged by the defendants.

In the case of *Guaranty Trust Co. of New York* v. *Hannay* (1) on appeal from Holt J. the question of the correctness of Noyes J.'s decision was distinctly raised (see assignment of errors, p. 353 of the record) as one of the grounds for granting a new trial. The Court, however, gave no decision or intimation of opinion at all on the point, and granted a new trial solely on the ground that the case was governed by the law of England. I am unable to see that where a point is presented for consideration to a Court with other points, and the Court bases its decision entirely on the other points and says nothing at all about the first, the inference should be that it approved it any more than it disapproved it. I do not, therefore, think that either of these cases can be taken as affirming the decision of Noyes J., and I think I am at liberty to express the opinion which I have formed on the evidence that the decision of Noyes J. is not in accordance with the current of American authority, and that this draft is unconditional in American as well as in English law. I have the less hesitation in doing so, because I have the greatest doubts whether the condition for which the defendants now contend was ever brought before him, and whether the whole matter urged before him was not the condition which the defendants' counsel now expressly disclaim, i.e., the condition of payment out of a particular fund. I am fortified in this conclusion by the fact that out of all the wealth of authority cited to us the learned counsel for the defendants were unable to refer us to any decision, American or English, in which the condition for which they now contend was held to have been imported into a draft by words similar to those in this case. There are cases, on the contrary, in which drafts were held to be unconditional in which it might have been argued that this condition existed and made it conditional, e.g., *Bank of Guntersville* v. *Jones Cotton Co.* (2), *Martin* v. *Brown, Shipley & Co.* (3), and *Amsinck* v. *Rogers* (4); but it did not occur to any one to suggest it. It is true that in those cases no question arose as to whether the supposed condition had been fulfilled, but if it had existed it would have made the draft conditional whether fulfilled or not.

(1) 210 Fed. Rep. 810.
(2) 156 Ala. 525.
(3) 75 Ala. 442.
(4) 189 N. Y. 252.

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But I must deal also with the plaintiffs' contention that, assuming this draft to be conditional, the defendants have proved no right to recover from the plaintiffs the amount they paid to the bank. Assuming the draft to be conditional, two positions are possible: (1.) The document, whether before or after acceptance, was never a bill of exchange or negotiable, and the bank therefore could have defended an action by the London City and Midland Bank on any ground that would have been available against Knight, Yancey & Co. (2.) Although conditional by American law, it must, by virtue of the proviso contained in s. 72, sub-s. 1 (*b*), of the Bills of Exchange Act, 1882, be taken as unconditional and negotiable as between the acceptor and any subsequent holder in England. In the former of these two positions there is considerable force in the plaintiffs' contentions which I have already mentioned, i.e., that as the bank chose to pay without any liability and after being directed by the defendants not to do so they were not entitled to indemnity from the defendants, and the defendants cannot make any claim to be reimbursed their payment to the bank because it was voluntary. But, in my opinion, either in the case of the bank's non-liability or liability the defendants have no claim against the plaintiffs. The money was not paid to the plaintiffs, and therefore in order to recover the defendants must, as it seems to me, base their claim on a warranty that the bill of lading was genuine, an agreement to indemnify the bank if it were not, or a request by the plaintiffs upon which the defendants paid the London City and Midland Bank. There is no express warranty, representation, agreement to indemnify, or request to pay, and if any one of these things is to be established it must arise by necessary implication from the circumstances of the transaction between the plaintiffs and the bank which took place in England. Whether there be such an implication is a matter to be decided according to the law of England, and in the earlier part of this judgment I have expressed my opinion that no such implication arises from the circumstances of the case.

In any event, therefore, I think that the defendants cannot recover and that the appeal should be allowed, the declarations asked for by the plaintiffs made, and judgment given for them on the counter-claim. The plaintiffs must have the costs here and below.

WARRINGTON L.J. read the following judgment:—After many days' discussion the result, in my opinion, is that the real question is a short one, namely, whether the plaintiffs, on presenting to the Liverpool bank for acceptance on behalf of the defendants a draft drawn upon them by Knight, Yancey & Co. accompanied by what purported to be a bill of lading of certain cotton, warranted the genuineness of the bill of lading, and are therefore liable in damages for breach of such warranty, the bill of lading having turned out to be forged, and the amount of the draft having been paid to the holders in due course. The answer to this question does not, in my opinion, depend upon the negotiability or otherwise of the draft, and is to be decided in accordance with English law. In this view the discussion as to the American law is largely, if not wholly, irrelevant, but as Bailhache J. has decided against the plaintiffs on the footing that the negotiability or otherwise of the draft is the determining factor, that this depends on American law, and that under that law it was not negotiable, and in deference to the elaborate argument addressed to us on the point, I propose to deal with it hereafter.

The facts are not in dispute, and there is no occasion to state them in detail, as they are fully and accurately stated in the judgment of Bailhache J. It is enough to say that the plaintiffs were the indorsees for value and in good faith of a draft drawn by Knight, Yancey & Co., of Decatur, Alabama, upon the Bank of Liverpool pursuant to a contract between the drawers and the defendants for the sale and purchase on credit of certain cotton. The draft ended with the words "and charge the same to account of $\frac{100}{\text{R.S.M.I.}}$ bales of cotton," being part of that included in the contract, and there was a reference in the margin to the date of sale and the grade of cotton. Documents purporting to be a bill of lading and certificate of insurance relating to the cotton were attached to the draft. The draft was presented to the bank by the plaintiffs for acceptance in the ordinary course and under no special circumstances. It was accepted by them, and the bill of lading and certificate of insurance were detached and retained by them. It was subsequently negotiated by the plaintiffs, and ultimately found its way into the hands of the London City and Midland Bank as holders in good faith and for value. It became due on April 27, and was paid by the Bank of

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Liverpool. It was at this time suspected, and was afterwards discovered, that the so-called bill of lading was a forgery, and that no cotton had been shipped as represented by it.

In January, 1911, Hannay & Co. commenced a suit in the United States District Court of New York against the Guaranty Trust Company, claiming payment by them of the amount of the bill on the ground, amongst others, that the Guaranty Trust Company had, by presenting the draft for acceptance under the circumstances hereinbefore mentioned, warranted the genuineness of the bill of lading. The Guaranty Trust Company demurred, and on May 23, 1911, their demurrer was overruled by Noyes J., the Circuit judge (1), on the ground that the draft was a conditional order and therefore not a negotiable instrument, the judge further holding that in this case there was a cause of action. The suit came on for trial before Holt J., district judge, in February, 1913, and resulted in a verdict and judgment for Hannay & Co. Holt J. expressed the opinion that he was bound by the judgment of Noyes J. on demurrer upon the points decided by him, and that, though in his view the case was governed by English law, he could see no distinction between that and American law in reference to the questions raised in the suit. The case was then taken to the United States Circuit Court of Appeals, where it was heard in December, 1913, with the result that the appeal was allowed and a new trial directed to be had. (2) The Court was of opinion that the rights of the parties were to be determined by the law of England, that it had been proved that under that law the draft was a negotiable instrument, and no such action as that in question would lie. They expressed no opinion one way or the other on the question whether Noyes J. was right in holding that under the law of America the draft was not a negotiable instrument or whether in such a case the action would lie. Though this judgment was, in fact, a decision in favour of the Guaranty Trust Company, and would in England have involved entry of judgment for them, the Court of Appeal in America had no jurisdiction to take this course, but could only order a new trial.

The case was not retried in America, but in October, 1914, the Guaranty Trust Company (whom I will now refer to as the plaintiffs) issued a writ against Hannay & Co., as defendants, claiming a

(1) 187 Fed. Rep. 686. (2) 210 Fed. Rep. 810.

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declaration negativing the liability alleged by the defendants. The defendants counterclaimed for the amount paid on the draft, alleging that the question of negotiability must be determined by American law, that by that law the draft was not a negotiable instrument, and that there arose under these circumstances an implied warranty such as that above referred to. Evidence as to American law was taken on commission, and the action was tried before Bailhache J. and a special jury in 1917, judgment being delivered on July 30. The learned judge held that the question whether the draft was conditional or not must be determined by American law, that he must accept the opinion of Noyes J. that under that law the draft was conditional, and, believing it to be conceded that in that case the defendants would be entitled to recover, he gave judgment for the defendants on their counter-claim and dismissed the plaintiffs' action for a declaration. At the same time he expressed the view that by English law the draft was unconditional, and therefore a negotiable instrument, and that the defendants would have no cause of action. He said further that, but for the judgment of Noyes J., which he thought had been approved by the New York Court of Appeals, he would have found that the American law did not differ from the English law on the points involved in the case. In the course of the trial the question whether there was a warranty in fact was submitted to the jury. They found there was no warranty and were then discharged. In saying that it was conceded that if the draft was a conditional order the defendants were entitled to recover the judge was under a misapprehension. Counsel in this Court agree that no such concession was made. It is true the point was not argued, and it may be that this induced the learned judge to believe that the concession referred to was made. It has been argued before us, and I think it is clearly open to the plaintiffs.

I propose now to deal with what I have stated above to be the real question, namely, whether under the circumstances there must be implied a warranty by the plaintiffs that the so-called bill of lading was a genuine document. There is clearly no express warranty, nor is there any express representation that the bill of lading was genuine, which, if acted on, might result in a warranty to the same effect. The defendants are driven to insist on an implied warranty.

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Whether there was or was not such a warranty depends on the intention with which certain acts were done : *Heilbut, Symons & Co.* v. *Buckleton.* (1) Moreover, " in business transactions, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men " : per Bowen L.J. in *The Moorcock.* (2) There appears to be some difference of opinion between the noble and learned Lords who sat to consider *Heilbut's Case* (1) as to whether the question of intention is for the jury (compare the speeches of Lord Haldane and Lord Atkinson). In the present case, if it be a question for the jury, they have negatived the alleged warranty, but without insisting on this as conclusive, and treating the question as one for the Court, or at all events as one which ought to be withdrawn from the jury on the ground that there is no evidence of warranty, I am clearly of opinion that the alleged warranty ought not to be implied.

I will first consider the case on the assumption that the draft was a bill of exchange in the proper sense, i.e., a negotiable instrument. The plaintiffs receive from the drawer the bill of exchange with the bill of lading attached. They are the indorsees of the bill, and have become so for value and in due course. They then present the bill to the drawee for acceptance. The consideration for the acceptance moves from the drawer to the acceptor, not from the indorsee, even in a case in which the indorsee requests the drawee to accept : *Robinson* v. *Reynolds.* (3) That is to say, the drawee accepts the bill, not in performance of any new engagement made between him and the indorsee, but by virtue of the arrangement he has with the drawer. But in truth the plaintiffs did not request the bank to accept ; they only desired to know whether the bank would acknowledge their liability to do so and perform it or not, with an intimation that in the latter case a well-known step would be taken. It is quite clear that in such a case there is no warranty of the genuineness of the signature of the drawer : *East India Co.* v. *Tritton* (4), the principle of which, though dealing directly with the signature of the indorser, applies also, with at least equal force, to that of the drawer. I can see no ground on which any such warranty should

(1) [1913] A. C. 30.
(2) (1889) 14 P. D. 64, 68.
(3) 2 Q. B. 196.
(4) 3 B. & C. 280, 289.

be implied as to the bill of lading. It is contended that by surrendering the bill of lading on acceptance the plaintiffs purported to transfer the property represented by it to the acceptors, and that it must be taken that they warranted the existence of such property and that the bill of lading represented it. The answer is that the indorsee of a bill of exchange with the bill of lading attached obtains a special property only in the goods defeasible upon acceptance, and on that event the property in the goods passes, not by virtue of the surrender to the acceptor of the bill of lading, but by virtue of the contract between the drawer as vendor of the goods and the acceptor as the purchaser thereof: *Mirabita* v. *Imperial Ottoman Bank*. (1) The bill of lading is surrendered, not by virtue of any contractual obligation between the indorsee and the drawee, but by virtue of the obligation he assumed towards the drawer. Under such circumstances I can see no room for any implication of warranty as to the genuineness of the bill of lading.

I have so far considered the question as if there were no direct authority on the point. But this is by no means the case. The precise question was decided by Malins V.-C. in *Leather* v. *Simpson*. (2) This case has been known to the profession since 1871, it has been treated in text-books as expressing the law, it has never been questioned, and in America, at all events, there are many cases reported in which it has been followed. I do not say this intending to throw any doubt on the correctness of the decision, with which, as will have been seen, I entirely agree, but only as indicating that, even if I did not, I should hesitate now to overrule it. In my opinion, therefore, if the draft be a bill of exchange, there is no such warranty as alleged.

But suppose it be not, that is to say, suppose it is a conditional order to pay and therefore not negotiable, and suppose the condition be that the bill of lading is genuine and that the goods have been shipped, with all respect to the learned judge and others who seem to have assumed that this would bring about a different result, I really fail to see how it would affect the question. The consequences of non-negotiability would be that the holder would be in the position of an ordinary assignee holding subject to any equities between the parties to the original contract, and if the drawer could not require

(1) (1878) 3 Ex. D. 164. (2) L. R. 11 Eq. 398.

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payment unless he gave the acceptor the goods, the holder could not do so either, but this is not a circumstance leading to the inference of an implied warranty that the drawer has performed or will perform his obligation; if anything there is less ground for implying the warranty in the case now under consideration than in the case of a negotiable instrument, inasmuch as the acceptor is in a stronger position as regards the holder than if the draft were negotiable, for he is not bound to pay even a bona fide holder if the drawer's contract with himself is broken.

The result is that the plaintiffs are not, in my opinion, under any liability to the defendants, and are entitled to the direction they ask, and to have the counter-claim dismissed.

The application of the American law, as found by Bailhache J., affects only the question whether the draft was negotiable or not, which is, in my view, immaterial, but as the learned judge has decided against the plaintiffs on this point I think it right to say a few words about it. The contention is that the question whether the draft is an unconditional order to pay is a question of form and must be determined by the law of the place of issue. I will assume that this was New York, though it is really indifferent whether it be New York or Decatur, the law in the two States of New York and Alabama being identical. It is further contended that under the law of the State of New York the draft in the present case would be held to be a conditional order, and therefore not negotiable. The learned judge has taken this view, influenced thereto by the judgment of Noyes J. on demurrer already referred to (1), which he regards as having tacitly at all events received the approval of a higher Court in America. The result is a strange one, for the law of New York relating to negotiable instruments is expressed in a statute which in all material respects is identical with our own Bills of Exchange Act, 1882, and was adopted for the express purpose of assimilating the law of New York to that of England. The same remark applies to the law of Alabama. It is clear, and indeed it is admitted, that by the law of England the addition of such words as "charge to the account of" particular goods would not have the effect of making the draft conditional, nor would the fact of the bill of lading being attached have that effect.

(1) 187 Fed. Rep. 686.

The defendants therefore have to satisfy the Court by evidence that the law of America differs on the point in question from the law of England, notwithstanding the desire of the Legislature to bring them into harmony. The onus lies on those who contend that the foreign law differs from that of this country: see per Lord Parker in *Dynamit Actien-Gesellschaft* v. *Rio Tinto Co.* (1) The learned judge has found that, but for the judgment of Noyes J. already referred to, he would have come to the conclusion on the evidence of the American lawyers and of the relevant decisions in the American Courts that the law of New York is in this respect the same as that of England, and that the draft would in America be treated as an unconditional order, and in this finding I agree. It is unnecessary to examine the many cases cited. I will only refer to *Amsinck* v. *Rogers.* (2) The draft in that case was practically identical in form with that now in question, except that it was a sight draft. Though the actual point for decision was whether certain provisions of the Austrian law were applicable, for the purpose of deciding this question the Court regarded as essential the question whether the draft was a bill of exchange under the law of New York. (3) The case was heard in the Court of Appeals of New York, and the judgment of the Court (one judge dissenting, but for what reason it does not appear) was delivered by Hiscock J. He says that there was no doubt, and in fact it was not denied by counsel for the appellants, that the instrument was a bill of exchange under the laws of the State of New York. There is not, in my opinion, any authority for saying that the mere fact that the instrument in the present case is not a sight draft is a material distinction, and secondly the case is a strong authority in support of the contention that under American law the instrument in the present case is a bill of exchange. It is not unimportant that the judgment was delivered by Hiscock J., who also delivered the judgment in *Springs* v. *Hanover National Bank* (4), hereinafter referred to.

I now turn to the judgment of Noyes J. delivered on the demurrer in *Hannay* v. *Guaranty Trust Co. of New York.* (5) The learned judge there found that the draft in question was conditional and was

(1) [1918] A. C. 260, 301.
(2) 189 N. Y. 252.
(3) Ibid. 265.
(4) 209 N. Y. 224.
(5) 187 Fed. Rep. 686.

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drawn "against the cotton." He does not explain what he precisely means by "drawn against the cotton," but he seems to treat "conditional" and "against the cotton" as synonymous. But I think it is clear that such an expression is used by lawyers simply to denote the fact that the draft is drawn as part of a mercantile transaction, and not to indicate that the fund produced by the goods referred to is the only fund from which the amount of the draft is to be paid: see *Brown, Shipley & Co.* v. *Kough* (1), and particularly the passage in the judgment of Chitty J. at p. 855, and that in the judgment of Cotton L.J. at p. 865. It was there decided that a direction to charge the amount of a draft to the account of particular goods did not operate as an equitable assignment of the goods, and both the judges mentioned above treat the draft there in question as drawn "against the goods." I cannot find that the expression has any more definite meaning in America. Noyes J. makes no reference to the definition of a bill of exchange in the New York statute, but founds his judgment exclusively on the authority of two cases, namely, *National Bank* v. *Merchants' Bank* (2) and *Guaranty Trust Co. of New York* v. *Grotrian.* (3) In the first of these two cases the point for decision was whether the holder of a bill of exchange drawn on account of cotton with a bill of lading attached was bound on obtaining acceptance of the bill of exchange to indorse the bill of lading to the acceptor, and it was held that it was his duty so to do. That the draft in that case was a bill of exchange in the proper legal sense does not appear to have been questioned. Noyes J. quotes and relies on one passage in the judgment, which is in the following terms (4): "Moreover . . . . the drafts upon their face showed that they had been drawn upon the cotton covered by the bills of lading. Both the plaintiffs, and their agents the defendants, were thus informed that the bills were not drawn upon any funds of the drawers in the hands of Green & Travis, and that they were expected to be paid out of the proceeds of the cotton." But if the contract is looked at I think it appears clearly that all that is meant is that the bills showed on their face that the transaction was a mercantile transaction, and that the bills were drawn in connection with a contract for the sale and purchase

(1) 29 Ch. D. 848.
(2) 91 U. S. 92.
(3) 114 Fed. Rep. 433.
(4) 91 U. S. 94.

on credit of the goods covered by the bill of lading. I cannot see anything in the judgment leading to the conclusion that the Court treated the bills as conditional in the sense that they were to be paid exclusively out of the proceeds of the cotton. In *Grotrian's Case* (1) the bill was in substantially the same terms as that in the present case, but the acceptance was a special one: "Accepted . . . . against indorsed bills of lading for 8417 bushels of flax seed per *Buffalo* s.s. at New York and certificate of insurance $8500." The decision appears to have been that looking at the terms of the acceptance the Court regarded this as given conditionally upon the delivery of the flax seed mentioned therein. It certainly was not decided that if the draft had been accepted simply the same result would have followed. The Court in fact came to the conclusion that the documents there disclosed a special contract, one of the terms of which was that the liability of the acceptor was conditional on the happening of a certain event. With the greatest respect to Noyes J. the conclusion I should come to on the whole of the evidence is that *Grotrian's Case* (1) was not an authority for his decision. He does not refer to or distinguish *Amsinck* v. *Rogers*. (2) Counsel before us saw the difficulty of contending that the draft was conditional in the sense that it is an order to pay out of a particular fund, and insisted that the condition is that the drawee shall have a valid bill of lading and certificate of insurance delivered to him. It is clearly a term of the contract between him and the drawer that the latter as vendor shall ship the goods and give him valid shipping documents, but it is quite a different thing to import such a term into the draft for the price. It may be done if the acceptance is so framed (see *Grotrian's case* (1)), but I can find no sufficient authority either in English or American law for inferring such a special contract from a plain acceptance of a draft containing a direction to charge against particular goods, and in fact so to hold seems to me contrary to the terms of both the English and the American statutes.

So far, then, I should find that the decision of Noyes J., though an item of evidence entitled to great weight, is not sufficient to outweigh the mass of evidence on the other side, and ought not to alter the conclusion to which but for it I should certainly come.

(1) 114 Fed. Rep. 433. (2) 189 N. Y. 252.

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But it is said that the decision of Noyes J. has been approved by the New York Court of Appeals in *Springs* v. *Hanover National Bank* (1) and by the United States Circuit Court of Appeals in *Guaranty Trust Co. of New York* v. *Hannay* (2), on appeal from the judgment of Holt J. In *Springs' Case* (1) the point decided was that dealt with in the earlier part of this judgment, namely, that the indorsee presenting a draft for acceptance with bill of lading attached does not warrant the genuineness of the bill of lading. Hiscock J. in support of his decision refers at length to two cases, *Hoffman & Co.* v. *Bank of Milwaukee* (3) and *Goetz* v. *Bank of Kansas City* (4), and then says, " The principles affirmed by these decisions are supported directly or indirectly by " a number of cases in England and America, including in particular *Leather* v. *Simpson* (5) and *Hannay* v. *Guaranty Trust Co. of New York.* (6) How the latter case supports those principles he does not explain ; all one can say is that he in no way accepts it as an authority on a point not relevant to the case before him. Moreover, if he had intended so to accept it he would have been virtually overruling his own decision in *Amsinck* v. *Rogers* (7), and it is difficult to suppose that he would have done so without some explanation. As to the decision of the United States Circuit Court of Appeals in *Hannay's Case* (2), I have already pointed out the substance of it. It did not involve the revision of Noyes J.'s judgment on demurrer, though it is true the appellants raised the point amongst their points of error. The question is not dealt with at all by the Court of Appeals, and in my judgment it would be going too far to say that under such circumstances they must be taken to have accepted the judgment as correct ; the utmost that can be said is that one would at first sight have expected some expression of doubt or dissent, but the absence of such expression may be accounted for by the clear opinion of the Court that the judgment was irrelevant in the view they took. On the whole, then, I should find, if it were necessary to decide the point, that on the question whether the instrument is a bill of exchange or not the American law is the same as the English,

(1) 209 N. Y. 224, 238.
(2) 210 Fed. Rep. 810.
(3) 12 Wall. 181.
(4) 119 U. S. 551.
(5) L. R. 11 Eq. 398.
(6) 187 Fed. Rep. 686.
(7) 189 N. Y. 252.

and that it is a bill of exchange, notwithstanding the judgment of Noyes J. I think the weight of this piece of evidence is overborne by that of the exceedingly strong evidence the other way.

The conclusion of the whole matter is that, in my opinion, the plaintiffs here are under no liability to the defendants, the appeal ought to be allowed, and a judgment entered for a declaration as asked by the plaintiffs and dismissing the defendants' counterclaim. I would like to add that I have not dealt with the suggested right of the defendants to recover on the ground of failure of consideration or mistake of fact for the reason that those points were not really argued on the defendants' behalf before us. It must not, however, be supposed that I think there is anything in them.

SCRUTTON L.J. read the following judgment:—In this case Messrs. Hannay, purchasers of certain cotton, are claiming to recover from the Guaranty Trust Company certain sums representing the price of the cotton, because the Guaranty Trust have presented for acceptance to Messrs. Hannay's bank a bill of exchange for the price of the cotton, accompanied by bills of lading, which, though the Guaranty Trust did not know it, had been forged by the vendors of the cotton. I accept, generally, the careful and accurate statement of facts and of the proceedings in this case contained in the judgment of Bailhache J., though I shall have to refer again to one or two points.

The enormous volume of sales of produce by a vendor in one country to a purchaser in another has led to the creation of an equally great financial system intervening between vendor and purchaser, and designed to enable commercial transactions to be carried out with the greatest money convenience to both parties. The vendor, to help the finance of his business, desires to get his purchase price as soon as possible after he has despatched the goods to his purchaser; with this object he draws a bill of exchange for the price, attaches to the draft the documents of carriage and insurance of the goods sold and sometimes an invoice for the price, and discounts the bill—that is, sells the bill with documents attached to an exchange house. The vendor thus gets his money before the purchaser would, in ordinary course, pay; the exchange house duly presents the bill for acceptance, and has, until the bill is accepted, the security of a

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pledge of the documents attached and the goods they represent. The buyer on the other hand may not desire to pay the price till he has resold the goods. If the draft is drawn on him, the vendor or exchange house may not wish to part with the documents of title till the acceptance given by the purchaser is met at maturity. But if the purchaser can arrange that a bank of high standing shall accept the draft, the exchange house may be willing to part with the documents on receiving the acceptance of the bank. The exchange house will then have the promise of the bank to pay, which, if in the form of a bill of exchange, is negotiable, and can be discounted at once. The bank will have the documents of title as security for its liability on the acceptance, and the purchaser can make arrangements to sell and deliver the goods. Before acceptance the documents of title are the security, and an unaccepted bill without documents attached is not readily negotiable. After acceptance the credit of the bank is the security, and an accepted bill with documents attached is unusual and not readily negotiable. It further appears from the evidence as to commercial usage on which the above statements are based that it is commercially convenient to have on the face of the bill an indication of the transaction in respect of which it is drawn. It is convenient for the exchange house to know that the documents of title relate to the transaction in respect of which the bill is drawn. It is convenient for the accepting bank and purchaser to be able to identify the bill as relating to a particular transaction, and to check the documents of title as relating to that transaction; and when the documents of title are detached from the bill, bills which on their face purport to be founded on commercial transactions, and to be "produce" or "commodity" bills, are more readily negotiable and realizable than bills which on their face show nothing, and may be "kites" or accommodation bills. It is very common, therefore, to find on the face of the bill a statement "pay . . . . and charge same to the account of" certain specified commodities. A witness from the exchange house found that in 23,000 bills in a period of five years 93 per cent. bore on their face these or similar words referring to the commercial transaction giving rise to the bill. As Bowen L.J. said in *Sanders* v. *Maclean* (1), "the practice of merchants . . . . is not

(1) (1883) 11 Q. B. D. 327, 343.

based on the supposition of possible frauds," and the great business of financing produce sales generally goes through safely because most transactions are honest. But fraud occasionally happens and it gives rise to the present dispute. The vendors originally forged bills of lading, and afterwards shipped goods to correspond, so that the goods arrived before the bill of exchange became due. They thus anticipated the time when they could honestly obtain the price, but in fact delivered the goods. But a crisis came when they forged the bills of lading, but did not ship the goods and became insolvent. The question would then arise who was to bear the loss, the exchange house who had presented for acceptance a bill of exchange with forged documents attached, or the accepting bank who had incurred a liability on their acceptance, or the purchaser, the bank's principal, if he had to indemnify them on that liability.

A confusing number of questions were argued and authorities cited in the case before us, and it is therefore vital clearly to define what is the cause of action alleged and the question we have to decide. (1.) This is not an action on the bill of exchange, or document to which the bank has put its signature, by a bona fide holder for value. In such an action the question might directly arise: Is the document sued on a negotiable instrument on which such a holder can recover in spite of the fraud of the drawer inducing the acceptance, or is it a conditional promise, or equitable assignment, the assigneee of which may be affected by the debtor's rights against previous parties though the assignee was ignorant of them? For in this case the Bank of Liverpool, the accepting bank, paid the City and Midland Bank, bona fide indorsees for value from the Guaranty Trust Company, after notice of probable forgeries and without raising any defence, and neither the Bank of Liverpool nor Hannays have claimed to recover the money so paid from the City and Midland Bank. (2.) Nor is it an action by purchaser against vendor on the contract of sale of the cotton asking for damages for failure to deliver goods or the return of the price on a total failure of consideration. Knight, Yancey & Co., the vendors, are insolvent, and it is not suggested that the Guaranty Trust are any parties to the contract of sale of the cotton, so that they could be sued for damages for delivery of inferior quality, for short delivery, or for non-delivery. (3.) Nor is it an action by the bank as agent asking for indemnity

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from the purchaser the principal, or by the principal against the bank for negligence in accepting without getting genuine documents. The purchaser, Hannays, inspected the documents and then instructed the bank to accept. On suspicion of the forgery the principal instructed the bank not to pay; the bank disobeyed the instructions, and the principal then indemnified them for a payment made against express instructions. (4.) It is not an action to recover money paid under a mistake of fact against any person to whom Hannays or the bank paid money. (5.) It is not an action of deceit for any fraudulent representation made by the Guaranty Trust, for it is admitted they were innocent of any defect, and were not reckless in putting forward the documentary bill.

The nature of the action is this: A principal has instructed his agent to undertake personal liability to a third party. The agent has paid an assignee of the third party on the ground of that liability, though his principal has told him, and still contends, he is not liable and has instructed him not to pay; and the principal has indemnified the agent against such payment. The principal then sues, not the agent, nor the person whom the agent has paid, but the original third party, alleging some promise or representation to the principal on which the principal can sue. Some things seem clear at any rate. Up to the time that the Bank of Liverpool accepted the bills with documents attached there was no contractual relation between the Guaranty Trust on the one hand and the bank or Hannays on the other. Indeed, the Guaranty Trust knew nothing of Hannays in the matter. When the Bank of Liverpool accepted a bill, if it was a negotiable instrument, of which the Guaranty Trust were indorsees, the two parties were as regards each other remote and not immediate parties, and failure of consideration to the bank for the bill did not give them any claim to recover money from their prior indorsees: see *Robinson* v. *Reynolds* (1), a judgment of the Exchequer Chamber, and binding on this Court. If the Guaranty Trust are liable to Hannays, it must be because by what happened they made some promise that the bills of lading were genuine documents, or, to use a phrase which in view of the many meanings of "warranty" I would rather avoid, warranted them genuine. To

(1) 2 Q. B. 196.

call their legal position a representation involves the same question, for an innocent representation gives no cause of action for its breach unless it is a term of a contract, and if it is said that the untruth of the representation entitles Hannays to rescind the contract made relying on that representation, the question is still, what contract had Hannays with the Guaranty Trust, and did it include a promise that the bills of lading were genuine ?

The actual transaction was this : The Guaranty Trust Company wrote from New York to the Bank of Liverpool at Liverpool : " We beg to enclose for favour of your procuring acceptance and transmitting for our account to " their London office " the bills noted at foot." This included the bill in question, which does not refer on the face of it to any documents of title, but had, in fact, such documents attached. The Bank of Liverpool asked Hannays to come and inspect the documents and instruct them whether the bill was in order for acceptance. Hannays did so, and requested the Bank of Liverpool to accept " on surrender of documents purporting to be as specified below . . . . Bill of lading representing R S S Z 100 rail and Serra Line." Thereupon the bank accepted the bill, detached the documents and kept them, and sent the accepted bill to the London office of the Guaranty Trust. The Guaranty Trust had no communication with Hannays, and knew nothing about them ; they asked for and got the personal liability of the Bank of Liverpool; and the Bank of Liverpool only described the documents to Hannays as " purporting to be bill of lading." It is clear that there was no express contract by the Guaranty Trust as to genuineness of documents ; if there was such a promise, it is to be implied from the above facts. It seems further to be clear that if that implication is a question of law, it is a question of English law, as all the material facts from which the implication can be made took place in England. There is only one matter in which American law might be material. If the bill drawn in America were by American law not a bill of exchange, as only a conditional promise to pay (a matter I deal with later), it might be necessary to consider whether it was therefore a conditional promise to pay in England, and whether the substitution of a conditional promise to pay, which is not negotiable, for a negotiable bill of exchange made any difference to the implication, if any.

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But was there such an implication ? Terms are to be implied in contracts, not because they are reasonable, but because they are necessarily involved in the contractual relation, so that the parties must have intended them, and have only failed to express them because they are too obvious to need expression : *The Moorcock* (1) ; *Hamlyn & Co.* v. *Wood & Co.* (2) Whether there was an implied contract or not was left to the jury. "It was rightly held by Holt C.J." in *Crosse* v. *Gardner* (3) and *Medina* v. *Stoughton* (4) "that an affirmation at the time of sale is a warranty, provided it appear on evidence to have been so intended" : per Buller J. in *Pasley* v. *Freeman* (5), approved by the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton.* (6) I am inclined to think, though I do not find it necessary to decide it, that unless there are undisputed facts which can only admit of one implication the question of implied contract in such a case should be left to the jury. If so, a city of London special jury have found there was no such implied contract, and there was certainly evidence on which they could so find. But if, there being no dispute as to the facts, the implication is for the Court, I am clearly of opinion, as was Bailhache J., that there was no such promise or representation. The Guaranty Trust were not parties to the contract of sale, or bound to the purchasers to carry it out ; they were not persons having peculiar knowledge of the vendor, or of his performance of the contract of sale. The purchasers themselves inspected the bills of lading before authorizing the bank to accept. The Guaranty Trust did not transfer any property of theirs to the Bank of Liverpool on acceptance. It is true that legal results followed from the bank accepting the bill put forward by the Guaranty Trust, but they were results following from change of property, and not from the creation of contracts. The Guaranty Trust could not take the acceptance and keep the documents ; the bank could not keep the documents and decline to accept the bill. But this was because, on the vendor's receiving an acceptance for the price of the goods, the property in the goods would pass under the contract of sale ; and it did not pass until he received the acceptance or payment ; the right to the documents followed the title to

(1) 14 P. D. 67.
(2) [1891] 2 Q. B. 488.
(3) (1689) Carth. 90.
(4) (1700) 1 Salk. 210.
(5) (1789) 3 T. R. 51, 57.
(6) [1913] A. C. 30, 43.

the goods: see *Shepherd* v. *Harrison* (1); *Mirabita* v. *Imperial Ottoman Bank*. (2) It is agreed that the exchange house by presenting the bill of exchange for acceptance does not warrant the genuineness of the drawer's signature; that is the concern of the acceptor to verify; it is curious, if not warranting this, it yet warrants the genuineness of the documents attached to the bill, about which it can know much less than it may know about the bill itself. The position of the exchange house seems to be: "Here is a bill which I am told to ask you to accept under some contract to which I am not a party; will you accept it? If you do I am told by the vendor to hand you documents under his contract, which at present I hold as security for my loan to him; if you do not, I can deal with my security and you cannot get the documents from the vendor." This is the view taken in *Woods* v. *Thiedemann* (3), where Pollock C.B. says: "The words 'bill of lading' mean such a document as the vendor might send or which was in the course of coming, professing to represent a cargo of wheat"; and see Bramwell B. (4) It is also the view taken by Malins V.-C. in *Leather* v. *Simpson*. (5) In that case the discounting bank sent forward a bill for acceptance, drawn in the form "pay . . . . and place to account 251 bales cotton per William Cummings," with a memorandum: The bank "holds bill of lading . . . . for 251 bales of cotton, per William Cummings"; and it was held that when the bill of lading turned out to be a forgery the acceptor could not recover from the bank the money they had paid them on the acceptance. While the reasoning of some parts of the judgment is not very precise, the case has stood unchallenged in result for over forty years, and I am not disposed to disturb it, especially as I think the result is correct. The decision in *Baxter* v. *Chapman* (6), a case arising out of the same frauds, is to the same effect.

If this is so, does it make any difference whether the document presented for so-called acceptance is a valid bill of exchange, or only a conditional promise to pay which may be an equitable assignment of funds? I think it makes no difference to the original presenter of the bill for acceptance except this, that if there is a

(1) (1871) L. R. 5 H. L. 116.
(2) 3 Ex. D. 164.
(3) (1862) 1 H. & C. 478, 490.
(4) Ibid. 495.
(5) L. R. 11 Eq. 398.
(6) 29 L. T. 642.

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condition in the document you have the less ground for implying a condition on the same subject-matter. It may make a difference to his assignee. It is suggested, as I understand, that the fact that the bill is drawn "charge to account of specified cotton," or is "drawn against cotton," makes it a promise to pay conditional on cotton having been shipped, and on genuine documents of title for that cotton being handed over; or, in the words of Hannays' counsel, "on condition that drawee had delivered to him a genuine bill of lading for the goods"; and, though it is admitted that the words of the document say nothing about bills of lading, it is said such a condition must be implied, or is involved in the "draft against cotton," and that, the words of the draft having been drawn in the United States, the Courts of the United States have put such a meaning on this form of bill that the English Courts must take that meaning to be the meaning here. It is quite accurate, in my opinion, to say that as between drawer and drawee, being parties to a contract of sale, the consideration for the acceptance of a bill for the price may be the handing over of genuine documents of title for the goods sold, and even as said by Fry L.J. in *Brown, Shipley & Co.* v. *Kough* (1), that this is a condition on the acceptance of the bill; but it does not follow, because the drawee is not bound to accept unless a condition is fulfilled, that, when he has accepted, his transferable or negotiable promise to pay is not unconditional. It turns on the terms of his promise to pay.

By the English Bills of Exchange Act, an unqualified order to pay, coupled with either an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount or a statement of the transaction which gives rise to the bill, is unconditional. These words seem expressly to cover the case where a produce bill is shown to be such by an identification on its face of the transaction giving rise to it, and I did not understand it to be argued that by English law a bill in this form was other than an unconditional promise to pay. But it was said that by the law of the United States it was, and the judgment of the learned judge below finds that by that law a bill in this form is a conditional promise to pay. The curious thing is that while the learned judge finds this as a fact he never states, nor do

(1) 29 Ch. D. 874.

the authorities on which he relies, that the condition is as alleged by the defendants here, and much of the discussion in the authorities and the judgment proceeds on the footing that the condition is that the duty to pay is limited by the existence of the fund, or that it is an order to pay out of a fund, and therefore conditional. It was not argued before us that this was the condition; and indeed it would be absurd to suggest that a promise to pay the purchase price of goods was conditional on the goods realizing the amount of that price. The learned judge has accepted as evidence of the fact in this case the judgment of Noyes J. on demurrer (1), referred to without disapproval in the subsequent decision of *Springs* v. *Hanover National Bank* (2), and not mentioned with disapproval or at all on this point in the subsequent decision in this case of the United States Circuit Court of Appeals that ordered a new trial. (3) It will be necessary to consider both the judgment of Noyes J. and the way it has been dealt with in subsequent cases. But before doing so this general observation should be made. Foreign law is a question of fact to an English Court; the judgment of a foreign judge is not binding on an English Court, but is the opinion of an expert on the fact, to be treated with respect, but not necessarily conclusive. We have one conclusive piece of evidence, the language of the Negotiable Instruments Law of New York, and s. 22 as to payment out of a fund is practically identical with the language of the English statute. A large number of cases have been decided in the United States Courts under this section. They will be found summarized in the notes to the section in Mr. Crawford's work on the statute, 2nd ed., p. 12, he having been the draftsman of the statute; and in Daniel on Negotiable Instruments, 4th ed., vol. 1, s. 50. The best test of principle I have found is laid down in *Munger* v. *Shannon* (4): "The true test would seem to be whether the drawee is confined to the particular fund, or whether, though a specified fund is mentioned, he would have the power to charge the bill up to the general account of the drawer, if the designated fund should turn out to be insufficient; . . . . if the transaction were business paper, the amount paid must be of such a character as to be entered as a debit on the debtor side of the account." When one applies this test to a bill drawn for

(1) 187 Fed. Rep. 686.
(2) 209 N. Y. 239.
(3) 210 Fed. Rep. 810.
(4) 61 N. Y. 255.

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the purchase price of goods, it seems impossible that the promise to pay should be limited to the fund produced by the goods sold, and it would seem clearly wrong to say, and indeed it was not argued, that a commodity bill "charge to account of goods purchased" was only a conditional promise to pay because limited to a particular fund.

This being cleared out of the way, I proceed to examine the judgment of Noyes J. He finds that if the draft, though with documents attached, had not referred on its face to the cotton Hannays could not recover. This appears to exclude any warranty, representation, or condition arising from presenting drafts with documents attached. But, he says, the draft refers on its face to cotton and is therefore conditional because of two authorities, which he cites. The first is *National Bank* v. *Merchants' Bank*. (1) The decision was that a discount house, who presents a produce bill for acceptance, is bound to surrender on acceptance the documents of title attached. The sentence on which the judge relies is (2): "The drafts upon their face showed that they had been drawn upon the cotton covered by the bills of lading . . . . and that they were expected to be paid out of the proceeds of the cotton." This sentence is a reason why the acceptor is entitled to have the documents of title, and appears to me to have no reference to whether his acceptance when given is conditional or to what the condition is. To hold that it is conditional because the bill would not be accepted unless it was supposed the documents were genuine appears to me to confuse the consideration for a promise with a condition in the promise. The second authority cited is the case of *Guaranty Trust Co. of New York* v. *Grotrian*. (3) There a draft "charge the same to account of . . . . flax seed" was accepted "against indorsed bills of lading"; the acceptance was clearly conditional. The Court said (4): "The request to pay was conditioned upon the delivery of the flax seed"; from which Noyes J. infers that they held that the words of the draft implied a condition. It seems to me clear that the Court did not mean this, for a few lines down they say, "If the acceptance had been unconditional, the party having the money should retain it," and had said the same thing in the first page of the judgment. The passage cited, in my view, means either that the consideration for

(1) 91 U. S. 92.
(2) Ibid. 94.
(3) 114 Fed. Rep. 433.
(4) Ibid. 436.

acceptance was the vendor's delivery of documents of title, or that the request to pay, if acceded to, gave a right to the delivery of documents under the contract of sale because the property passed. If Noyes J. meant the draft was conditional because only payable out of a fund, it was not argued he was right, and we were referred to a mass of authorities to the contrary; if he meant it was conditional because the order was "pay if you receive genuine documents," there is no other authority in United States law to that effect, and several cases, especially those decided in Alabama, should, if there was such a condition, have been decided the other way.

The subsequent history of this judgment is that the trial judge held himself bound by Noyes J.'s view of the American law, but it was admitted before him, and he so states, that the case was governed by English law (see the briefs in the case); and he held, contrary to the opinion of the only witness called before him, that the English law was the same as the American law as stated by Noyes J. The United States Circuit Court of Appeals, holding that the case was governed by English law, reversed the judge below who had held it was as stated by Noyes J. and sent the case for a new trial on English law. (1) It was therefore unnecessary for them to discuss the American law. The only further support of the judgment is that it was cited in *Springs* v. *Hanover National Bank*. (2) The bill there only referred to commodities by a print "cotton" on one side of the draft, but had bills of lading for cotton attached; they were forgeries, and it was held that the acceptor could not recover the money paid on the bill. This is supposed to support Noyes J.'s decision, because that decision is mentioned as one of numerous cases "directly or indirectly supporting" certain principles, namely, that in such a case the acceptor could not recover. Having regard to the facts and the other cases cited, it seems to me clear that the citation is of the first part of the judgment of Noyes J., which does support those principles, and not of the second part, which has nothing to do with them. Bailhache J. refers to some other American authorities, such as *Lowery* v. *Steward* (3) and *Brill* v. *Tuttle*. (4) But as the condition in all these cases was "payment out of a fund" or equitable assignment, and as it was not even

(1) 210 Fed. Rep. 810.
(2) 209 N. Y. 239.
(3) 25 N. Y. 239.
(4) 81 N. Y. 454.

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argued before us that there was such a condition in this case, I do not refer to them. No American case was cited to us where such a condition as contended for in this case, as to genuineness of documents, had been established.

I have come, therefore, to the conclusion that both by English and American law this draft was an unconditional order to pay. If so, the learned judge below, as I read his judgment, would have arrived at a different result, in accordance with his own views of the law, which I think I am really giving effect to in reversing his judgment. This renders it unnecessary for me to express a final opinion on a point on which I feel great difficulty, the true meaning of s. 72, sub-ss. 1 and 2, of the English Bills of Exchange Act, especially as to the exact extent of application of sub-s. 1 (*b*). It would be curious if an American bill, differing from the English form, were valid by English law for enforcing payment, and invalid in a suit to recover a payment which had been made under it. And I have great doubts as to the true meaning of "interpretation" in sub-s. 2, especially in view of the explanations of Sir M. D. Chalmers (Bills of Exchange, 7th ed., p. 266), and the comments thereon of Mr. Dicey (Conflict of Laws, 2nd ed., p. 593). But as in my view the English and American laws are the same, the question need not be decided here. On the commercial position, it seems to me to be a question of the haggling of the market whether English buyers and banks can secure a term in the contract of purchase that acceptances with documents attached, when presented by persons other than the vendor, shall be guaranteed as genuine by those presenting them, or whether they will continue to rely on the fact that commercial transactions are generally honest.

In this case, in my opinion, the appeal should be allowed; the effect of this is that the English purchasers cannot recover from the American discount house the money they have paid in reliance on documents which turn out, without the knowledge of the discount house, to be forged by the vendor. The appeal succeeds, with costs here and below.

Appeal allowed.

Solicitors for plaintiffs: *Crosley & Burn.*

Solicitors for defendants: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1918
June 6.

HOSIER BROTHERS *v.* EARL OF DERBY, Secretary of State for War.

Practice—Striking out Pleadings—Relief against the Crown—Contract by Servant of Crown on behalf of Crown—Declaratory Judgment—Action or Petition of Right.

By a contract made between the plaintiffs and His Majesty's Principal Secretary of State for War the Secretary of State hired from the plaintiffs a steam engine and hay press upon the terms that the engine should be used only for the purpose of working the press. The plaintiffs brought an action against the defendant, who was Secretary of State for War at the date of the writ, but at the date of the contract did not nor did he now hold that office, alleging that the defendant had improperly used the engine for other than the specified purposes, and claiming a declaration that the plaintiffs were entitled to compensation for the improper user of the engine, and certain other declarations as to the construction and meaning of the contract:—

Held, that the action was not maintainable. It could no more be brought against a servant of the Crown for a declaration as to what the contract meant than for substantive relief upon the contract itself.

Appeal by the defendant from an order of Coleridge J. reversing an order of the Master, who had directed that the statement of claim in the action should be struck out on the ground that the defendant was not liable to be sued, in his official character as Secretary of State, for a declaration.

The plaintiffs were the owners of steam hay presses and engines, and they brought this action against the defendant, the Earl of Derby, in his capacity of Secretary of State for War, claiming certain declarations as to the construction of an agreement dated June 26, 1916. At the date of the contract Lord Derby was not Secretary of State for War, but he did hold that office when the writ was issued.

The agreement, which was in writing, was expressed to be made between His Majesty's Principal Secretary of State for War of the one part and the plaintiffs of the other part. By it the plaintiffs

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agreed to provide for the use of the Secretary of State for War, for the sum of 6*l.* 10*s.* per week, a hay press and a steam engine capable of driving it. The agreement was to continue for the period of the duration of the war, subject, nevertheless, to termination as therein expressed. The agreement also contained an arbitration clause. It was stated in the statement of claim that the defendant was sued solely in his capacity as Secretary of State for War. It was alleged that it was an express or implied term of the agreement that the engine should not be used except for the purpose of working the press and for purposes reasonably incidental thereto, and that in breach of the said term the defendant used the engine for other purposes, namely, for heavy road haulage, which subjected it to greater strain and wear than was contemplated by the agreement. The plaintiffs claimed (1.) a declaration that the defendant was not entitled to use the engine for any purpose other than working the press. (2.) A declaration that the defendant was liable to pay to the plaintiffs, by way of quantum meruit or otherwise, such sum in addition to the specified hire as might reasonably compensate the plaintiffs for the greater strain and stress to which the engine had been subjected by reason of its user for heavy road haulage than the strain and stress to which it would have been subjected by reason only of the specified user. They further claimed three other declarations as to the true construction of the agreement, but did not ask for any substantive relief.

A summons for directions taken out by the plaintiffs was adjourned by the Master for the further hearing of an application by the defendant, who attended upon the summons, to strike out the statement of claim as disclosing no cause of action. The defendant also applied to refer the matter to arbitration, and the plaintiffs applied for leave to amend the statement of claim by making the action one against Lord Derby personally, and also by making it an action under the War Department Stores Act, 1867 (30 & 31 Vict. c. 128). The Master refused the application for a reference to arbitration on the ground that by attending the summons for directions the defendant had taken a step in the action. He ordered the statement of claim to be struck out because an action for a declaration against the Crown only lies against the Attorney-General. He refused leave to amend by making the action one against Lord Derby

personally, and he gave to plaintiffs leave to amend so as to sue under the War Department Stores Act, 1867.

On appeal from the Master, Coleridge J. rescinded the order of the Master and directed the defendant to deliver a defence.

The defendant appealed.

Branson (*Sir F. E. Smith A.-G.* with him) for the Crown. This action is not maintainable on three grounds: (1.) It is brought upon a contract between the plaintiffs and a servant of the Crown, and the defendant cannot be sued upon it. The plaintiffs' remedy is by petition of right. (2.) In so far as the action sounds in tort the head of a Government Department is not liable for wrongful acts of under-officials unless such acts are expressly authorized by him: *Raleigh* v. *Goschen*. (1) (3.) If the plaintiffs cannot sue the defendant on the contract, still less can they bring an action for declarations based upon it. Before the learned judge *Graham* v. *Public Works Commissioners* (2) and *China Mutual Steam Navigation Co.* v. *MacLay* (3) were relied upon, and he thought that the action ought not to be stopped in limine. Neither of those cases applies to the present. The first turned upon special circumstances, and it is submitted that Bailhache J. in the second misapplied the passage which he quoted from *Raleigh* v. *Goschen* (1) There the Shipping Controller had himself intervened and done the act complained of. It will be said that *Dyson* v. *Attorney-General* (4) shows that an action may be brought against the Crown for a declaratory judgment where no other relief is claimed; but that is only in a properly constituted action against the Attorney-General as representing the Crown. There serious questions were raised as to the rights of every member of the public under the Finance Act.

[SCRUTTON L.J. referred to Lord Halsbury's Laws of England, vol. 7, p. 96, ss. 172, 173.]

It will further be said that the defendant might be sued under the War Department Stores Act, 1867 (30 & 31 Vict. c. 128), s. 20. But this action is not so framed. Moreover, the fact that by that Act permission is given to defend an action does not give the subject a

(1) [1898] 1 Ch. 73.
(2) [1901] 2 K. B. 781.
(3) [1918] 1 K. B. 33.
(4) [1911] 1 K. B. 410.

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right to sue: *Williams* v. *Admiralty Commissioners* (1); Robertson's Civil Proceedings by and against the Crown (1908), p. 33.

Jowitt for the respondents. An action for a declaratory judgment will lie against the Crown: *Dyson* v. *Attorney-General.* (2) In order to justify the striking out of the statement of claim it must be shown that it is so hopelessly bad as to be almost an abuse of the process of the Court: see observations of Fletcher Moulton L.J. (3)

[SWINFEN EADY M.R. It is said against you that this action is hopelessly bad.]

In *Graham* v. *Public Works Commissioners* (4) Phillimore J. said that the defendants were in the position of servants of the Crown who could be sued on their contracts for the purpose of obtaining a judgment declaratory of the right of the subject who had contracted with them: *Williams* v. *Admiralty Commissioners* (1); *Kirk* v. *Reg.* (5) This action might have been brought under the War Department Stores Act, 1867, and, if necessary, I now ask for leave to amend by framing it in that way. The right to defend actions under that Act implies the existence of a right in the subject to sue. The statement of claim might be maintained if it were under that Act, and the Court will not order it to be struck out if by amendment it can be saved.

Branson in reply. The suggestion that this is an action of tort is frivolous. Under the War Department Stores Act the action must be brought against the Secretary of State, and not against a named defendant. The plaintiffs deliberately abstained from taking advantage of the former leave to amend. No further leave should now be given.

June 6. SWINFEN EADY M.R. This is an appeal from an order of Coleridge J. reversing an order of the Master, and directing that the Master's order be rescinded and that the defendant be ordered to deliver a defence to the statement of claim.

The action is brought by Messrs. Hosier Brothers against the defendant, the Earl of Derby, who is described as His Majesty's Principal Secretary of State for War, upon a contract entered into

(1) (1851) 11 C. B. 420.
(2) [1911] 1 K. B. 410.
(3) [1911] 1 K. B. 418.
(4) [1901] 2 K. B. 781, 791.
(5) (1872) L. R. 14 Eq. 558.

with them by the Secretary of State for War on June 26, 1916. At the date when the writ was issued the defendant was Secretary of State for War; but he was not Secretary of State for War when the contract was entered into, and he does not now hold that office.

The defendant objects that the action is not maintainable, and contends that where a contract is made on behalf of the Crown, by a servant of the Crown, the remedy of the subject is by petition of right and not by action, and no action will lie. It cannot now be disputed that the general principle is that a servant of the Crown who contracts on behalf of the Crown cannot be sued on the contract—certainly from the time of *Gidley* v. *Lord Palmerston* (1) that cannot be doubted.

Then it is said that the action is brought, not for any substantive relief, but only for a declaratory judgment, and that, having regard to what was said in *Dyson* v. *Attorney-General* (2), an action may be brought for a declaratory judgment, or at all events that it is not so clear that such an action may not be brought as that it ought to be struck out at this early stage.

I am of opinion that an action can no more be brought against a servant of the Crown for a declaration as to what a contract means than it can be brought for a substantive remedy on the contract itself.

Then it is said that it is also an action of tort, and that although the user of the machine in question was a breach of contract, at the same time it was a tortious user and may be treated as a tort. The action is frivolous with regard to that, because, although an individual tortfeasor may be sued for his own tort, it is not alleged that Lord Derby personally had anything whatever to do with any misuse of the engine, or that he had himself authorized, or sanctioned in any way, any improper use. Under these circumstances I am of opinion that the appeal ought to be allowed.

It was urged that an action might be brought under the War Department Stores Act, 1867. The present action is not brought under that statute, it is not brought against the Secretary of State for War for the time being as such; it is brought against a named defendant, Lord Derby.

(1) (1822) 3 Brod. & B. 275.
(2) [1911] 1 K. B. 410; [1912] 1 Ch. 158.

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Swinfen Eady M.R.

Then it was asked that leave should now be given to amend so as to allow the proceedings to be framed under that statute. Leave was originally given by the Master, but the plaintiffs deliberately determined not to avail themselves of that leave. A period was limited for amending the statement of claim, and that period had expired before the appeal to the judge. In my opinion the time ought not now to be extended for converting the action from what it now is into an action under the Act of 1867; substantial amendments would have to be made, and the time for so doing has expired without advantage having been taken of the leave given.

For these reasons I am of opinion that the only order we ought to make is to allow the appeal and restore the order of the Master with costs here and below.

SCRUTTON L.J. I agree.

DUKE L.J. I agree.

Appeal allowed

Solicitors: *The Solicitor to the Treasury; Joynson-Hicks, Hunt, Cardew & McDonald.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.
1918
June 12, 13.

ROFF *v.* BRITISH AND FRENCH CHEMICAL MANUFACTURING COMPANY AND GIBSON.

Defamation—Libel—Privilege—Common Interest—Absence of Malice—Letter to Firm—Publication to Clerks—Loss of Privilege.

A dispute with reference to a commercial transaction between the defendants and M. & C. having been referred to arbitration, M. & C. proposed to appoint the plaintiff as their arbitrator. The defendants objected to his appointment and wrote to M. & C. a letter containing defamatory statements concerning the plaintiff. The letter was opened in the ordinary course of business by a clerk of the firm, who placed it on the desk of another clerk, who handed it to one of the principals. In an action for libel the defendants pleaded that the letter was written on a privileged occasion. At the trial the jury found that the letter was a libel, but that there was no malice, and assessed the damages. Upon these findings judgment was given for the plaintiff:—

Held, on appeal, that the letter was a communication between parties having a common interest in its subject-matter, that the occasion was therefore privileged, that the privilege was not lost by the publication to the clerks of M. & C., and that judgment ought therefore to be entered for the defendants.

Pullman v. *Hill & Co.* [1891] 1 Q. B. 524 distinguished.

Boxsius v. *Goblet Frères* [1894] 1 Q. B. 842 and *Edmondson* v. *Birch & Co.* [1907] 1 K. B. 371 applied.

APPEAL from the verdict and judgment at the trial before Darling J. and a special jury. The action was for libel.

The alleged libel was contained in a letter written by the defendants to a firm of Mann & Cook, between whom and the defendants a dispute had arisen with regard to a commercial transaction. Mann & Cook, under the terms of the contract, requested an arbitration and appointed the plaintiff as their arbitrator. The defendants then wrote to Mann & Cook the letter complained of, in which they said: "We decline to accept a man with the German name of Roff as your arbitrator. If you have no Englishman to appoint, then we will go to the Courts." This letter was sent by post addressed to Mann & Cook in the ordinary way. It was opened by

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one of their clerks, who placed it on the desk of another clerk, who in his turn placed it upon the desk of one of the principals of the firm.

The plaintiff was not a German. At the trial the jury, in answer to questions left to them by the judge, found that the letter was a libel, but that it was written without malice; and they assessed the damages at 50*l*. Upon these findings judgment was given for the plaintiff for that amount.

The defendants appealed on the ground that the letter was a privileged communication between themselves and Mann & Cook, and that, as malice was negatived by the jury, they, and not the plaintiff, were entitled to judgment.

There was a cross-appeal by the plaintiff claiming, if the defendants' appeal should be decided against him, a new trial on the ground of misdirection by the learned judge on the question of malice.

Douglas Hogg K.C. and *Maddocks* for the appellants. The letter complained of was a communication made by one party interested to another having an interest in the same matter. The occasion was therefore privileged, and the jury found that there was no malice: *Toogood* v. *Spyring* (1); *Whiteley* v. *Adams* (2); *Stuart* v. *Bell.* (3) Excessive publication was not pleaded. The claim for damages was addressed to the publication to Mann & Cook, and the occasion was privileged.

[They were stopped.]

J. B. Matthews K.C. and *Ricardo* for the respondent. The learned judge came to the conclusion that if the occasion was privileged the privilege was lost by excessive publication. The Court will take judicial notice of the fact that where letters are written to firms they will probably be opened by a clerk: *Pullman* v. *Hill & Co.* (4) The publication alleged is by sending a libellous letter to a firm. That contemplates that the letter will be opened by others than those to whom it is addressed. The publication is unreasonably wide and loses its privilege: *Williamson* v. *Freer.* (5)

(1) (1834) 1 C. M. & R. 181.
(2) (1863) 15 C. B. (N.S.) 392.
(3) [1891] 2 Q. B. 341.
(4) [1891] 1 Q. B. 524.
(5) (1874) L. R. 9 C. P. 393.

[SCRUTTON L.J. referred to *Boxsius* v. *Goblet Frères* (1) and *Edmondson* v. *Birch & Co.* (2)]

Those cases proceeded upon a different principle.

[SWINFEN EADY M.R. referred to *Sharp* v. *Scues.* (3)]

Williamson v. *Freer* (4) was not cited there. It is nowhere overruled. Brett J. in terms laid it down that unnecessary publication destroyed the privilege.

[DUKE L.J. In *Sharp* v. *Scues* (3) Cozens-Hardy M.R. said that the question was whether the defendant intended the libel to be read by a third party.]

The intention of the libeller is immaterial. If the occasion was privileged the matter of the libel is comment in excess of the privilege: *Tuson* v. *Evans.* (5)

[*Maddocks.* *Tuson* v. *Evans* (5) was overruled in *Cooke* v. *Wildes.* (6)]

Pullman v. *Hill & Co.* (7) is still good law. If a libellous communication is so addressed that it may be read by others than those to whom it is addressed, the privilege is avoided.

Upon the cross-appeal: The question of malice was not properly left to the jury: *Royal Aquarium* v. *Parkinson.* (8) If a statement is made recklessly not caring whether it is true or false, that is evidence of malice, and destroys the privilege. The judge did not put that to the jury.

Hogg K.C. in reply. It is said that publication to clerks of the firm destroyed the privilege, and for that *Pullman* v. *Hill & Co.* (7) was relied upon, but that decision does not touch this case. It was distinguished in *Boxsius* v. *Goblet Frères* (9) and *Edmondson* v. *Birch & Co.* (10) See also *Gomersall* v. *Davies.* (11)

Upon the cross-appeal: There was no misdirection, and there is no case for a new trial.

SWINFEN EADY M.R. (after stating the facts). The appellants contend that the statements in their letter were made on an occasion

(1) [1894] 1 Q. B. 842.
(2) [1907] 1 K. B. 371.
(3) (1909) 25 Times L. R. 336.
(4) L. R. 9 C. P. 393.
(5) (1841) 12 Ad. & E. 733.
(6) (1855) 5 E. & B. 328.
(7) [1891] 1 Q. B. 524.
(8) [1892] 1 Q. B. 431.
(9) [1894] 1 Q. B. 842.
(10) [1907] 1 K. B. 371.
(11) (1898) 14 Times L. R. 430.

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of qualified privilege, and there can be no doubt that if the statements were made on such an occasion they would be prima facie privileged. The occasion was the appointment of the arbitrators to decide the dispute between the parties; it was a matter in which Messrs. Mann & Cook and the appellants had a common interest; they were both concerned in the question of constituting the proper tribunal to determine the dispute between them. It was said by Mr. Matthews that arbitrators appointed in commercial arbitrations often take up the position of advocates of the party by whom they are appointed. This Court, however, has frequently laid down that that is not the proper position for an arbitrator to take up. It must be remembered that under certain circumstances provided for in the Arbitration Act, although each party has the right of appointing one arbitrator, it may happen that the arbitrator appointed by one party may become sole arbitrator to determine the dispute, and in my judgment it cannot really be disputed that the occasion on which that letter was written was a matter in which the party writing it and the party to whom it was written had a common interest. That being so, the occasion was a privileged occasion.

It was urged on behalf of the respondent that, even if the occasion were privileged, the matter complained of was outside the privilege of the occasion, and no doubt there may be cases where the introduction of extraneous matter may take away the protection on the subject to which privilege attaches, and the existence of privilege on one matter would give no protection to libels introduced into the same communication. But that is not true of this communication; nothing irrelevant was introduced into it. The defamatory matter was germane to the matter in respect of which the parties had a common interest, and therefore there was no ground, in my opinion, for contending that there was any matter introduced that was outside the privilege. Therefore it comes to this, that the statements were made on a matter in which the defendants and Messrs. Mann & Cook had a common interest, namely, the appointment of one of the arbitrators to determine the dispute between them. Both parties being interested in a suitable person being appointed, the defamatory matter was directly referable to the interests which gave rise to the privileged occasion; it was directly referable to what the writers considered to be a disqualification for adjudicating upon

the dispute between the writers on the one hand and Mann & Cook on the other hand.

That being so, the publication was privileged unless there was malice to rebut the prima facie protection. The jury negatived any malice. The question was put by the learned judge to the jury, Was it written or published with malice ? and the answer was No. Then a question arose with regard to the direction of the learned judge, and according to his note the learned judge said : " I hold that the publication to the clerk was not privileged even if writing to Mann & Cook was." Now that refers to this. The defendants' letter to Mann & Cook was opened by a clerk in their office ; it was then placed on the desk of another clerk, who placed it on the desk of one of the principals. That would be material on a question of publication ; but no question arises with regard to publication, because the libel was obviously published ; it was not written to the plaintiff, but it was written to Mann & Cook, and the letter to Mann & Cook contained the defamatory matter that was published of and concerning the plaintiff, so that the publication is amply proved. Then the publication complained of in respect of which damages are claimed is the publication to Mann & Cook—that is the only publication which is alleged in the statement of claim ; and it was in consequence of that publication that the plaintiff alleged that he had been injured in his credit and reputation, and it was for that that he was seeking damages. It may well be that the judge did not exclude from the consideration of the jury the circumstances connected with the opening of the letter upon the question of malice. It might have been relevant upon the question of malice, but not on the question of a separate publication to a separate person, which would give ground for a separate action for damages—an action in respect of a publication not within the scope of the present action.

With regard to the authorities, it was urged on behalf of the plaintiff that the mere fact that a defamatory communication, prima facie privileged, is communicated to a third person destroys the privilege. In my opinion that proposition cannot be maintained. The case of *Pullman* v. *Hill & Co.* (1) has been dealt with many times since the date of its decision. It was qualified and distinguished by Lord Esher in *Boxsius* v. *Goblet Frères* (2),

(1) [1891] 1 Q. B. 524. (2) [1894] 1 Q. B. 842.

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and it was further dealt with by the Court of Appeal in *Edmondson* v. *Birch & Co.* (1), where the rule was laid down in these terms by Cozens-Hardy L.J.: "The authorities appear to me to shew that the privilege is not lost so long as the occasion is used in a reasonable manner and in the ordinary course of business." And Fletcher Moulton L.J. said: "If a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business." There is no suggestion here that the letter sent to Mann & Cook was not written in the usual ordinary course of business. A further explanation of *Pullman* v. *Hill & Co.* (2) was suggested by Mr. Douglas Hogg, that in that case the defamatory matter was not written to the person who had the common interest with the writers, but in fact was written to different persons; it was written to a firm of five partners, two of whom only, in respect of their separate interests, were concerned in the matter with regard to which the dispute had arisen. I am of opinion that, the jury having negatived malice, there was nothing in the present case to destroy the qualified privilege, and that being so, the plaintiff upon the findings of the jury was not entitled to recover, and judgment should be entered for the defendants.

The plaintiff asked for a new trial by reason of the inadequacy and insufficient direction of the judge upon the question of malice. We have had before us a very fragmentary note of the judge's summing-up. There is no shorthand note. Counsel have supplied the deficiency as best they could from notes taken by them of the judge's summing-up, but in my opinion the plaintiff has wholly failed to establish that there was any direction of the learned judge that was either inaccurate or insufficient. It is quite manifest that the question of whether the statement was made recklessly or not was a matter that was before the judge, and that the direction which the learned judge gave was not inaccurate nor improper in any respect. That being so, I see no ground for disturbing the verdict of the jury, nor for directing a new trial by reason of any inadequacy, nor any insufficiency of the direction of the learned judge as to what in law would constitute malice.

(1) [1907] 1 K. B. 371, 382. (2) [1891] 1 Q. B. 524.

For these reasons I am of opinion that the cross-appeal fails, and that on the defendants' appeal judgment ought to be entered for the defendants, with costs here and below.

SCRUTTON L.J. On the trial of an action for libel before Darling J. and a jury the defendant appeals saying that he ought to have judgment entered for him on the findings of the jury. The plaintiff, while resisting that, says that if he is not entitled to keep the judgment he has obtained he is at any rate entitled to a new trial because of misdirection by the judge. [The Lord Justice stated the facts, and continued :]

In his action the plaintiff alleged that the libel was published to Mann & Cook, and that fact appears to render it unnecessary for this Court to consider a number of cases which have been cited as to under what circumstances the fact that a letter is read by a clerk, shorthand writer or typist of the sender, or by a clerk, shorthand writer or copyist of the receiver, constitutes a separate publication to those servants. When it becomes necessary, ample guidance will be found in the judgments of the Court of Appeal—contrasting, for instance, *Huth* v. *Huth* (1) on one side, where a butler conceived it to be within his duties to look into the interior of all the halfpenny letters sent to his employer, and that was held not to be publication, with such a case as *Gomersall* v. *Davies* (2), where it was found that the writer knew that a letter he sent in a particular way would be read by clerks, and it was held to be a publication. That question does not arise in this case, because the only publication alleged is to Mann & Cook, which was undoubted.

The next matter is that the defendants say : " We published on a privileged occasion, and the privileged occasion was this : that we had an interest in the character of the arbitrator to be appointed to decide our dispute ; we could have come to the Court to revoke the submission on the ground of the qualities of that arbitrator, and the fact that an arbitrator, if he was in fact a German, was appointed to decide our dispute was a matter which interested us, and a matter on which we had a right to express our opinion to the other party who was proposing to nominate him." Now what does Darling J. hold in regard to that ? It was of course for him to decide whether

(1) [1915] 3 K. B. 32. (2) 14 Times L. R. 430.

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it was a privileged occasion, and his note is: "I hold that publication to clerks is not privileged even if writing to Mann & Cook was." It must have been through some momentary misapprehension that he thought that publication to clerks was alleged here and that that was not privileged.

It appears to me that the publication to Mann & Cook was clearly privileged. One assumes that the statement is false before one begins to consider whether the occasion was privileged. If it is true, there is no need for privilege. The character of an arbitrator to be appointed to decide a dispute between the writer and the receiver of the letter is a matter in which, in my view, the writer of the letter has an interest, and a duty to himself, to his firm, and to his shareholders, to express his opinion about the other party to the arbitration. One gets, therefore, that the letter, the publication of which is admitted, was written on a privileged occasion.

So far the defendants succeed. How has the learned judge entered judgment for the plaintiff? He has done so, apparently, because in the course of the publication to Mann & Cook the letter has come before their clerks who have opened it, and the learned judge has held that that destroys the privilege. Now from that point of view we have the guidance of the decision of the Court of Appeal in the case of *Edmondson* v. *Birch & Co.* (1), where it was held, as is expressed in practically the same way both by the late Master of the Rolls and by Fletcher Moulton L.J., that when you have a privileged occasion, the fact that in making the communication on a privileged occasion in the reasonable and usual business manner, having regard to the subject-matter of the communication, you bring it before other subordinates, either your own or those of the receiver, does not destroy the privilege. One can quite understand that, given a business communication containing a very serious allegation against a man's character, it would be quite right that you should adopt more care in limiting your communication to the higher officials of a firm than if you were writing an ordinary business letter which did not contain any imputation on character at all. But the mere fact that in the ordinary reasonable methods of business communication a matter comes before copying clerks or typists and clerks who open letters is decided by the Court of Appeal

(1) [1907] 1 K. B. 371.

in *Edmondson* v. *Birch & Co.* (1) not to destroy the privilege, and in this case I can see no evidence whatever which can induce one to think that in this case it destroys the privilege. I cannot help thinking that the learned judge's ruling was given without his attention having been drawn to this decision of the Court of Appeal, or else was given on the supposition that there was in the pleadings an allegation of separate publication, as a separate tort, to clerks, and for which, possibly, no privilege might be claimed. The result is that in my view the defendants are entitled to succeed on their appeal.

But, says the plaintiff on his cross-appeal, supposing that is so, yet I am entitled to a new trial, because the learned judge ought to have directed the jury, in the language of the well-known case of *Royal Aquarium* v. *Parkinson* (2), with which every judge who tries a libel case is thoroughly familiar, that malice is not mere spite, but may include a state of prejudice or recklessness not amounting to spite—honest prejudice.

The plaintiff has, however, not satisfied us that there was anything wrong in the summing-up; indeed we have no materials before us upon which we can form an opinion whether it was defective or not.

For those reasons I decline to accede to the application for a new trial, and the result is that the defendants' appeal succeeds and the plaintiff's cross-appeal fails.

DUKE L.J. I agree. It seems to me that this action was disposed of by the verdict of the jury that the publication of the libel was without malice. It was an action in respect of a publication to Mann & Cook. The publication was indisputable. The defence which was set up was that they published it upon a privileged occasion, and the answer of the plaintiff to that plea of privilege was that there had been malice. In the circumstances of this case the character of the occasion left very little room for debate.

As has been pointed out by the other members of the Court, it was a matter in which both parties were interested, and the letter was referable to the subject-matter. Counsel for the respondent addressed an argument to the Court, founded upon the case of *Tuson*

(1) [1907] 1 K. B. 371. (2) [1892] 1 Q. B. 431.

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v. *Evans* (1), to the effect that where there was upon the face of the communication strong evidence of excess in the language used it was for the Court to decide whether the apparent excess did not destroy the privilege. Well, in subsequent cases it has been pointed out, with regard to the direction to the jury, that the course taken in *Tuson* v. *Evans* (1) was a mistaken course, and that excess in the language used upon a privileged occasion, or other excess in the exercise of the privilege, does not destroy the privilege of the occasion but only raises the question whether the defamatory language complained of is protected by the privilege of the occasion.

As soon as the privileged occasion was established, and the jury found there was no malice, there was an end of the action with regard to the publication to Mann & Cook. The plaintiff introduced, as part of his proof in respect of the publication to Mann & Cook, proof that the publication extended to their clerks. Counsel, however, disclaimed here, and apparently in the Court below, any intention to found a separate cause of action upon that publication, and I think some mistake must have arisen on that subject in the Court below. The learned judge's direction with regard to privilege was that the publication to the clerks was not a publication on a privileged occasion. That question seems to me not to have arisen. That being so, there being no action in respect of publication to the clerks, and no question as to whether there was a publication for which the defendants in the action were liable, the action fails, and in my judgment there ought to have been judgment for the defendants.

Now the plaintiff appeals against the summing-up of the learned judge on the ground of non-direction and misdirection. So far as there is matter before the Court to show what the direction was, it seems to me to have been perfectly correct. As to the absence of direction, as has been pointed out, it was for the plaintiff to establish it. The substance of the appeal is that the language used was so intemperate, and was such an excess of what was reasonable to communicate in a manner which might reach clerks, that really the plaintiff ought to have succeeded. The jury were to decide the matter of malice. There is no proof before the Court of any misdirection by the learned judge; I think the proof is to the con

(1) 12 Ad. & E. 733.

trary. As to the absence of direction, I believe that a sufficient direction was given. We know what discussion took place, and we see that the attention of the jury, as well as the attention of the Court, was directed to the proper issues by the discussion of the case before the jury by the learned counsel.

I think the defendants' appeal ought to succeed, and that the plaintiff's cross-appeal fails.

Solicitor for the appellants: *J. I. Jones.*

Solicitor for the respondent: *Alexander Rubinstein.*

G. A. S.

WEST SUFFOLK COUNTY COUNCIL *v.* OLORENSHAW.

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June 18, 19.

Education—Non-provided School—Dispute between Managers and Local Education Authority—Special Statutory Tribunal—Jurisdiction of Courts ousted—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-s.* 3.

By s. 7, sub-s. 3, of the Education Act, 1902, "If any question arises under this section between the local education authority and the managers of a school not provided by the authority, that question shall be determined by the Board of Education."

It being the duty of the local education authority under that section to pay the wages of the school cleaner appointed by the managers, a dispute between the managers and the local education authority as to the proper amount of such wages is a matter which the Board of Education alone can determine, and a county court has no jurisdiction to adjudicate upon it.

APPEAL from the Bury St. Edmunds County Court.

The respondent, the Rev. J. R. Olorenshaw, was the rector of the parish of Rattlesden in the county of West Suffolk, and chairman of the managers of a non-provided school in that parish. The appellant council were the local education authority. In September, 1916, the woman who acted as school cleaner, and who received 6*s.* a week wages, tendered her resignation on the ground that the work was too hard for her, in consequence of the size of the school, the distance that water had to be carried from the pump, and the weight of the desks. No man was obtainable to do the work, and no other woman would undertake it single-handed. The managers had no alternative but to leave the school uncleaned or appoint another

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woman to help the existing cleaner. They eventually adopted the latter alternative and paid the two women 4*s.* 6*d.* each. The county council refused to pay the additional 3*s.* per week for the cleaning of the school on the ground that in other parishes in the county 6*s.* was considered sufficient. A long correspondence took place on the subject, but the council refused to recognize the special conditions of that particular school or to depart from their fixed rule to pay 6*s.* and no more. The managers wrote to the Board of Education complaining of the attitude of the council, but did not formally submit the dispute to them for decision. The Board suggested that the managers should allow the council to appoint their own cleaner, but nothing came of that suggestion. In November, 1917, the managers, who had in their hands some money belonging to the county council, sought to reimburse themselves out of that money for the extra 3*s.* a week which they had for some time past been paying to the school cleaners. The council sued them in the county court for the money which they had in hand, and the managers counterclaimed for the extra 3*s.* a week. At the hearing the council took exception to the jurisdiction of the county court to entertain the counter-claim on the ground that it involved a question within s. 7, sub-s. 3, which it was for the Board of Education alone to decide. The case of *Gillow* v. *Durham County Council* (1) was referred to, in which the House of Lords adjudicated upon the question whether the appointment of a caretaker and cleaner was vested in the managers or in the local education authority, and Lord Haldane said that s. 7, sub-s. 3, " was not intended to apply to a far-reaching question of law " such as that. The county court judge, being under the impression that the Board of Education had in the present case refused to adjudicate in the matter on the ground that it was not a question within sub-s. 3, heard the counter-claim and decided in favour of the managers. The county council appealed.

Macmorran K.C. and *Leighton* for the appellants. The county court had no jurisdiction to hear the matter of the counter-claim. It was a question as to the reasonableness of the amount of the cleaner's wages, and that is essentially a matter for the Board. In *Gillow* v. *Durham County Council* (1) the question was one of law

(1) [1913] A. C. 54, 57.

turning on the construction of the statute; here the question is one of fact. Moreover, it is to be observed that Lord Haldane's dictum was only obiter, for, though the council in that case had pleaded to the jurisdiction, that defence was not insisted upon. It was not disputed in *Gillow's Case* (1) that the duty to "maintain and keep efficient" the school, which under s. 7, sub-s. 1, is imposed on the council, includes the duty to pay the reasonable wages of the cleaner. The provision in sub-s. 3 that questions arising under the section should be determined by the Board meant that they should be determined by the Board alone, and that the jurisdiction of the ordinary Courts should be ousted. That is the interpretation generally put upon sections creating a particular statutory tribunal to deal with particular cases. Of that principle *Norwich Corporation* v. *Norwich Electric Tramways Co.* (2) is an illustration. In the present case a decision by the Board as to the proper rate of the cleaner's wages was a condition precedent to a right of action to recover the amount.

Douglas Hogg K.C. and *A. T. Lawrence* for the respondent. The question in dispute was not merely what sum was reasonable, but was one of principle, whether the council were entitled to insist on the managers conforming to their hard and fast standard without regard to the special conditions of the particular school, which they admittedly never visited although invited to do so. That question was just as much one of law as the question in *Gillow's Case* (1), to which Lord Haldane said that sub-s. 3 did not apply.

SHEARMAN J. In this case the managers of a non-provided school in Suffolk had to provide a cleaner for their school. They were unable, owing to the special circumstances of the school, to get one at less than 9*s.* a week. The county council, who, as the local education authority, have to pay the cleaner's wages, insisted that, as other parishes in the county could secure a cleaner for 6*s.* a week, 9*s.* was too much, and they refused to pay more than 6*s.* A long correspondence extending over twelve months passed between the managers and the council. The former tried to induce the council to come down and see the place for themselves, but they declined to do so, and took up the position that, having fixed a rate of wages

(1) [1913] A. C. 54. (2) [1906] 2 K. B. 119.

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for the parishes in the county generally, they must require the managers to conform to it. The managers wrote to the Board of Education and complained of the council's attitude, but unfortunately they did not ask the Board to decide the matter in dispute; they only asked for their advice, and nothing resulted. Eventually, to bring matters to a head, the managers, who had in hand some money which it was their duty to pay over to the council, detained it and claimed to recoup themselves for the excess 3*s.* a week which they had to pay to the cleaners out of their own funds. Thereupon the council sued them in the county court for the money, and the defendants counterclaimed for what they had paid. As soon as the case came before the county court the plaintiffs' counsel called attention to the provisions of s. 7 of the Education Act, 1902, under which the local education authority are to "maintain and keep efficient" the school. That expression has been held to include the obligation to pay the cleaner's wages. And by sub-s. 3, "If any question arises under this section between the local education authority and the managers of a school not provided by the authority, that question shall be determined by the Board of Education." It was accordingly contended that the matter in dispute raised by the counter-claim was one for the Board to decide, and that until the Board's decision had been given the county court had no jurisdiction. It had been suggested obiter by Lord Haldane in *Gillow* v. *Durham County Council* (1) that sub-s. 3 "was not intended to apply to a far-reaching question of law" like the one then before him, and the county court judge was apparently persuaded by the defendants that the Board of Education had refused to adjudicate in the present case, presumably because they thought that it fell within that dictum. As far as I can see there is upon the correspondence no evidence that they did so decline. But even if they did, that could not give the county court jurisdiction if the question was one to which the sub-section applied. To what questions does it apply? In my opinion they are questions of fact relating to the expense of administering the school, such as questions whether certain expenses have been reasonably incurred. The present question was to my mind essentially one which came within the sub-section, and fell to be decided by the Board of Education. The Legislature in

(1) [1913] A. C. 54, 57.

appointing the Board as the statutory tribunal meant that it should be the sole tribunal and that the jurisdiction of the ordinary Courts should be ousted. There are many other statutes under which the same thing has been held; for instance, in *Norwich Corporation* v. *Norwich Electric Tramways Co.* (1) it was held that the provision for arbitration in s. 33 of the Tramways Act, 1870, excluded the jurisdiction of the High Court with respect to differences coming within that section; and in *Great Western Ry. Co.* v. *Phillips & Co.* (2) it was similarly held that a claim by a trader for damages for detention of trucks under the company's special Act could only be determined by an arbitrator appointed under the Act. The analogy of those cases decides the present. The county court had therefore no jurisdiction to deal with it. It is said that this defence arising under sub-s. 3 was a statutory defence of which notice ought to have been given under the County Court Rules. That contention is untenable. An objection to the jurisdiction does not come within the rule as to notice, for if it is not taken by the parties it may be taken by the Court, and, further, may be taken at any stage of the proceedings. The county court judge's judgment must be set aside.

SANKEY J. I am of the same opinion.

Appeal allowed.

Solicitors for county council: *Whites & Co., for Greene & Greene, Bury St. Edmunds.*

Solicitors for defendants: *Crawley, Arnold & Co., for Gudgeons, Peecock & Prentice, Stowmarket.*

(1) [1906] 2 K. B. 119. (2) [1908] A. C. 101.

J. F. C.

C. A.
1918
April 26, 29;
June 24.

[IN THE COURT OF APPEAL.]

BIRD *v.* KEEP.

Employer and Workman—Compensation—Fatal Accident—Bomb dropped by Enemy Aircraft—Special Risk—Cause of Death—Evidence—Record of Coroner's Inquisition—Certificate of Death—Admissibility—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A workman was killed as the result of a bomb dropped by enemy aircraft on an oil and colour warehouse to which he was sent by his employer in the ordinary course of his employment. His widow applied for compensation. The facts proved before the county court judge were that in the case of a fire breaking out upon the premises in which the deceased workman met his death dense and suffocating smoke would be produced from the materials stored there; that while he was upon the premises they were wrecked and set on fire by a bomb or bombs from hostile aircraft; and that the deceased workman was found in the basement of the premises buried under the wreckage but without any apparent external marks of injury upon him. The applicant sought to put in evidence, as showing the cause of death, the record of the coroner's inquisition and a certified copy of the entry in the register of deaths. The county court judge refused to admit them as evidence. He nevertheless held upon the evidence, apart from these documents, that the workman died of suffocation by smoke; that the employment exposed him to a special risk; and that he met his death by an accident arising out of and in the course of his employment:—

Held, that there was evidence from which the county court judge might reasonably and properly draw the conclusions of fact at which he arrived.

Held, also, that neither the record of the coroner's inquisition nor the certificate of death was admissible as evidence of the cause of death, and that the county court judge was therefore right in refusing to admit them.

Appeal by the employer from an award of the judge of the Clerkenwell County Court, sitting as an arbitrator under the Workmen's Compensation Act, 1906, in favour of the widow of the deceased workman, Ebenezer Bird, who met with his death on July 7, 1917, as the result of a bomb dropped by enemy aircraft.

The following statement of facts is taken from the written judgment of Swinfen Eady M.R.:—"The deceased workman was a

messenger or porter employed by the respondent, a varnish merchant, and he was sent on the day in question, in the ordinary course of his duty, to fetch some goods of that class from the warehouse of a firm of wholesale oil and colour manufacturers or dealers situate in the city of London. While the man was upon those premises for this purpose, on that morning, a bomb was dropped on the building by enemy aircraft, which were taking part in an air raid, and the warehouse was thereby set on fire. The air raid took place over the metropolis before noon on the day in question. The contents of the warehouse upon which the bomb fell were of a highly inflammable nature, and the building collapsed and was set on fire. An officer of the fire brigade proved that when he arrived at the fire about 2 P.M. the building had then collapsed, and there was a fire still burning in the basement when he got there. There was evidence that the contents of such a building would give forth a dense smoke when burning. At some time the same night after 11 P.M. the dead body of the workman was found at the foot of the back staircase covered with debris, but without any signs of violence on the body. The learned judge upon the evidence, and in a very careful judgment, came to the conclusion that the employment of the deceased exposed him in a special way to the common danger from air raids, and so as to render the risk which he ran a risk incidental to his employment. He found that the inherent conditions of inflammability of the goods contained in this oil and colour warehouse threw upon the building a special and additional risk of fire, which exposed the persons employed there to special dangers from fire, and accordingly that the deceased was thus exposed to a risk not shared by other members of the public in the vicinity, whether in the streets or in neighbouring buildings. The judge further found, as an inference from the facts proved, that the deceased died from suffocation by smoke. He thus found that the deceased met his death by an accident arising out of and in the course of his employment."

The county court judge accordingly awarded the applicant the amount claimed on behalf of his dependants, namely, 156*l.*, as compensation.

The employer appealed. The appeal was heard on April 26, 29, 1918.

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Rigby Swift K.C. and *Herbert-Smith* for the appellant. The county court judge has held that the workman met with his death through suffocation from smoke produced by burning chemicals, and that as he was exposed to special risk the accident which occasioned his death "arose out of" his employment. It is submitted that there was no evidence to support that finding. The judge rightly rejected the verdict of the coroner's jury and the certificate of death. The effect of the verdict of a coroner's jury was discussed in *Grime* v. *Fletcher.* (1)

A. Powell K.C., *S. P. J. Merlin*, and *T. W. Morgan* for the respondent. There was ample evidence to support the finding of the county court judge apart from the inquisition of the coroner and the certificate of death. But it is submitted he was wrong in rejecting them. The coroner's inquisition is evidence of the cause of death. Under the Coroners Act, 1887 (50 & 51 Vict. c. 71), the jurors, guided by the coroner, have to find the cause of death of a person who meets his death suddenly. The inquisition is a public document made by a properly authorized individual in the course of his duty and respecting facts which are required to be recorded for the public benefit. It is at all events some evidence, though not necessarily conclusive: *Harvey* v. *Rex* (2); *Jones* v. *White* (3); *Stokes* v. *Dawes* (4); *Reg.* v. *Gregory* (5); Phipson on Evidence, 5th ed., p. 335; Taylor on Evidence, 10th ed., p. 1204, s. 1674. A coroner's inquisition may be evidence of the cause of death, but may not be evidence that a murder has been committed. In *Reg.* v. *Gregory* (5) the judges would not have dealt with the sufficiency of the evidence if they had not thought it was admissible. An inquisition in lunacy is always admitted to be read, but it is not conclusive evidence, as it may be traversed: *Sergeson* v. *Sealey* (6); *Faulder* v. *Silk* (7); *Prinsep* v. *Dyce Sombre.* (8) In *The Mangerton* (9) certain interrogatories which had reference to remarks made by a jury, who inquired into the circumstances of the death of one of the seamen drowned, and the verdict of the jury were ordered to be

(1) [1915] 1 K. B. 734.
(2) [1901] A. C. 601.
(3) (1717) 1 Str. 68.
(4) (1826) 4 Mason, 268.
(5) (1846) 8 Q. B. 508; 15 L. J. (M.C.) 38.
(6) (1742) 2 Atk. 412.
(7) (1811) 3 Camp. 126.
(8) (1856) 10 Moo. P. C. 232.
(9) (1856) Swab. 120.

struck out, but there what was sought to be put in evidence was the remarks of the jury. In *Hill* v. *Clifford* (1) an order of the General Medical Council was held to be prima facie evidence that the defendants had been guilty of professional misconduct. It is submitted that the inquisition of a coroner stands on the same footing. Judgments in rem are dealt with in the *Duchess of Kingston's Case.* (2)

[SWINFEN EADY L.J. referred to East's Pleas of the Crown, vol. 1, p. 383.]

The coroner was present at the hearing before the county court judge and gave evidence of the statement made at the inquest by the doctor, who had since died. Under s. 21 of the Coroners Act, 1887, it is the statutory duty of a medical man to attend and give evidence before the coroner's jury. If he makes a statement in the course of his duty, that statement is admissible in evidence : *Price* v. *Earl of Torrington* (3) ; *Reg.* v. *Buckley.* (4)

It is submitted that the county court judge was entitled to draw the inference he did from the evidence before him that the most probable cause of the workman's death was suffocation by the heavy smoke from the burning oils : *Owners of Ship Swansea Vale* v. *Rice* (5) ; *Kerr* v. *Ayr Steam Shipping Co.* (6) ; *Owners of S.S. Serbino* v. *Proctor.* (7)

Rigby Swift K.C. in reply. It is of little use citing the facts of other cases to show what inferences may be drawn from them. There are numerous cases in which it has been held that inferences of fact may be drawn, but there must be evidence on which they are based. It is not sufficient merely to guess : see *Barnabas* v. *Bersham Colliery Co.* (8) ; *Marshall* v. *Owners of S.S. Wild Rose.* (9) It is submitted that there was not here sufficient evidence to justify the county court judge in drawing the inference he did. All the cases cited with reference to coroner's inquisitions are in the appellant's favour. In none of them was an inquisition allowed to be put in as evidence of the cause of death. A coroner's inquisition is in quite a different position from an inquisition of lunacy. The former

(1) [1907] 2 Ch. 236, 243, 257.
(2) (1776) 2 Sm. L. C., 12th ed., 754.
(3) (1703) 1 Salk. 285 ; 2 Ld. Raym. 873.
(4) (1873) 13 Cox, C. C. 293.
(5) [1912] A. C. 238.
(6) [1915] A. C. 217.
(7) [1916] 1 A. C. 464.
(8) (1910) 103 L. T. 513.
(9) [1910] A. C. 486.

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purports to find facts, the latter determines status. In *Irish Society* v. *Bishop of Derry* (1) what was admitted were statements made by a public officer in the performance of his duty. Here what is sought to be put in evidence is a statement of a doctor who is now dead of his opinion as to the cause of death. It is incredible that if a coroner's inquisition is admissible as evidence of the cause of death there should be no authority which supports that view. All the practice is against it. In *Jones* v. *White* (2) it was decided that such an inquisition was not admissible in evidence. It was admitted there for the purpose of informing the judge, but it was stated that it was not to be taken as a precedent: see the cases cited in the footnote to the report of that case.

[SWINFEN EADY L.J. referred to *Duke of Beaufort* v. *Smith*. (3)]

In *Grime* v. *Fletcher* (4), where a workman committed suicide, the Court held that there was no evidence to justify the finding of insanity by the county court judge.

Reg. v. *Gregory* (5) is not an authority for holding that a coroner's inquisition is admissible in evidence. In that case the inquisition had been admitted in the Court below, and what the Court were there considering was its sufficiency. The point that it could in no case be admissible was not brought to the attention of the judges. The duties of coroners are now laid down by the Coroners Act, 1887, and nowhere in that Act is there any suggestion that an inquisition can be used as evidence in a civil action. The county court judge was therefore right in excluding it as evidence. It is submitted that there are here no facts which point to one cause of death rather than another.

Cur. adv. vult.

June 24. SWINFEN EADY M.R. (6) read the following judgment:— The employer appeals from a judgment of the county court judge of Clerkenwell, which determined that the dependants of the deceased workman, Ebenezer Bird, were entitled to compensation under the

(1) (1846) 12 Cl. & F. 641, 668.
(2) 1 Str. 68.
(3) (1849) 4 Ex. 450.
(4) [1915] 1 K. B. 734, 737, 738.
(5) 15 L. J. (M.C.) 38; 8 Q. B. 508.
(6) In the interval between the hearing of the appeal and the delivery of judgment Swinfen Eady L.J. had been appointed Master of the Rolls.

Act. The deceased was killed on July 7, 1917, by a bomb dropped from an enemy aircraft on that day.

It was not disputed that the workman met his death "in the course of" his employment, but it was denied that the event arose "out of" his employment. [His Lordship stated the facts as above set out, and continued:] In my opinion, there was evidence, carefully and exhaustively reviewed and analysed by the judge, from which the conclusions of fact at which he arrived might reasonably and properly be drawn, and accordingly the appeal fails.

The applicant endeavoured to put in evidence the inquisition of the coroner and jury, and a certified copy of the entry in the register of deaths as evidence not only of the fact of death, but also of the cause of death. The judge rejected both, and held that they were not admissible in evidence for such purpose, but, lest his ruling should not be upheld on appeal, he consented to look at the certificate thus tendered, which states as the cause of death of the man in question "suffocation by smoke when fire occurred, as a result of bombs dropped by enemy airmen."

As the judge decided in favour of the workman's dependants without the additional evidence, the question whether it was properly rejected does not in strictness arise; but as the question is one of general importance, and has been fully argued, I think it right to express my opinion upon it.

The certified copy of the entry in the register of deaths is to "be received as evidence of the . . . . death to which the same relates without any further or other proof of such entry" (6 & 7 Will. 4, c. 86, s. 38; see also 37 & 38 Vict. c. 88, s. 38). The certificate is not by statute made evidence of the cause of death, but only of the death itself. By statute 37 & 38 Vict. c. 88, s. 16, where an inquest is held on any dead body, the coroner is required to send to the registrar of deaths a certificate giving information concerning the death, and specifying the finding of the jury with respect to the particulars required to be registered concerning the death, and to the cause of death, and the registrar is to enter in the prescribed form and manner the death and particulars. There is not, however, any statutory provision that all the particulars so entered shall be received in evidence.

Decisions of Courts of first instance are conflicting as to whether

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the certificate is evidence of the date on which the event happened. Thus Lord Romilly held that the entry was evidence of the birth having taken place before the date of registration, but not of the exact date of birth ; *In re Wintle.* (1) This has been the rule acted upon in Chancery. Sir Francis Jeune decided the contrary in *In the Estate of Goodrich.* (2) He purported to follow *Reg.* v. *Weaver.* (3) But that was a case stated, and the point raised by it was whether the certified copy of the entry was admissible without a witness verifying it. The case did not raise the question whether the certificate was evidence of the exact date of birth : see also *Wilton & Co.* v. *Phillips* (4) and *Brierley* v. *Brierley.* (5) Even if the entry be evidence of the exact date of the event recorded, whether birth or death, as to which I do not express any opinion, as the point has not been argued, it is not, in my opinion, evidence of the cause of death.

Now as to the inquisition. The ground upon which the record of the inquisition was tendered in evidence was that it was a public document made by the authorized agents of the public, in the course of official duty, and respecting facts which were of public interest or required to be recorded for the benefit of the community : see *Duke of Beaufort* v. *Smith* (6) ; *Sturla* v. *Freccia.* (7) It was not suggested that the inquisition was conclusive as to the cause of death, as the inquisition may be traversed, but it was urged that it was admissible, and that the finding of the jury recorded in it was prima facie evidence of the cause of death.

The coroner's inquisition is not like a judgment in rem. Nothing is done which is conclusive upon any person affected by it. In *Garnett* v. *Ferrand* (8) it was laid down by the Court of King's Bench that an inquiry before a coroner ought, for the purposes of justice, in some cases to be conducted in secrecy ; that cases may occur in which privacy may be necessary for the sake of decency, others in which it may be due to the family of the deceased. An inquiry before a coroner is merely in the nature of a preliminary investigation. It is not of any binding force. Hence it was decided by the Court of Queen's Bench in *Reg.* v. *Ingham* (9) that if evidence not

(1) (1870) L. R. 9 Eq. 373.
(2) [1904] P. 138.
(3) (1873) L. R. 2 C. C. 85.
(4) (1903) 19 Times L. R. 390.
(5) [1918] W. N. 204; since reported [1918] P. 257.
(6) 4 Ex. 450.
(7) (1880) 5 App. Cas. 623.
(8) (1827) 6 B. & C. 611, 626.
(9) (1864) 5 B. & S. 257.

on oath be received in a coroner's court it is no ground for a certiorari to bring up the inquisition with a view to its being quashed. And a rule for a certiorari on the ground that the coroner had laid down the law to the jury improperly was also refused, and on the further ground that there was no evidence to warrant the finding of the jury, was also refused. The Coroners Act, 1887, s. 4, sub-s. 1, now requires a coroner to examine on oath all persons tendering their evidence.

Under these circumstances I am of opinion that the result of an investigation conducted by the coroner, however valuable for certain purposes, cannot in law be treated as prima facie evidence against any person of the facts found by the jury. It is true that at different periods of our history other views on this subject have prevailed. Lord Coke considered that in his time the verdict of a coroner's jury in a case of suicide or felo de se was conclusive against the executor of the deceased: 3 Co. Inst. 55, "The executors or administrators of the dead shall have no traverse thereunto." This rule was altered in Lord Hale's time, all findings of an inquisition being considered traversable: 1 Hale, P. C., 416, 417.

Coming to more recent times, in 1846 arose the case of *Reg.* v. *Gregory*. (1) It was the trial of a criminal information for libel, imputing that the Duke of Brunswick had murdered, or been concerned in the murder of, one Eliza Grimwood. Mr. Carter, a coroner for Surrey who had held an inquest on the body of a woman called Eliza Grimwood, produced the inquisition containing the verdict of the jury on that occasion. It was objected that the evidence was inadmissible; that it was not evidence against the defendant, being res inter alios acta, and that it was no evidence of a murder having been committed. The inquisition was admitted and the defendant found guilty. A motion was then made for a new trial, on the ground that the coroner's inquisition had been improperly received in evidence, or to enter a verdict of not guilty, pursuant to leave reserved. Although the rule was refused, the observations of all the judges go to show that, although admissible for a limited and collateral purpose only, it was to be treated as of very little, if any, weight, and that the finding of the jury was not any evidence of the

(1) 8 Q. B. 508; 15 L. J. (M.C.) 38, 40.

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facts purporting to be found. Lord Denman said: "The coroner produced the inquisition; that may not have been admissible as a document on which to found further proceedings; but it was perfectly so, to shew that he took notes of what occurred on the occasion of his holding an inquest, and to identify the woman on whom it was held, (who was proved, by other evidence, to have been murdered,) as Eliza Grimwood." Thus the Chief Justice did not admit the inquisition as any evidence of the finding of the jury. Patteson J. and Coleridge J. gave judgment to the same effect; Wightman J. stated the inquisition was insufficient to support an allegation that any murder at all had been committed. In *Prince of Wales, &c., Association Co.* v. *Palmer* (1) (relating to Palmer the Rugeley poisoner) no objection appears to have been taken to the coroner's inquisition being put in, and therefore the case cannot be regarded as any authority on the point. In *Grime* v. *Fletcher* (2) a workman, who had injured his eye by an accident arising out of and in the course of his employment, became depressed and eventually committed suicide, but there was no evidence of insanity as the cause of suicide. At the inquest a coroner's jury had returned a verdict of suicide whilst in a condition of temporary insanity. It was held that his death could not be deemed to be the result of the accident, and I adhere to the observations which I made in that case: "Quite rightly no reliance was placed upon the finding of the coroner's jury in this matter. It is common knowledge that coroners' juries take a compassionate view of such cases, the effect of which is to ensure Christian burial."

The respondent relied on an American case of *Stokes* v. *Dawes* (3) before Story J. That, however, was not a case of a coroner's inquest, but of an inquest of office, by the Attorney-General, for lands escheating to the Government by reason of alienage. So also inquisitions of lunacy may be read, as has been held repeatedly: *Sergeson* v. *Sealey* (4); *Faulder* v. *Silk* (5); *Prinsep* v. *Dyce Sombre*. (6) But there is a clear distinction between these inquisitions which determine status and coroners' inquests which purport to find facts.

(1) (1858) 25 Beav. 605.
(2) [1915] 1 K. B. 734, 743.
(3) 4 Mason, 268.
(4) 2 Atk. 412.
(5) 3 Camp. 126.
(6) 10 Moo. P. C. 232.

In my opinion the finding of the coroner's jury was not admissible in the present case. It merely amounted to the opinion of the coroner's jury as to the cause of death upon the evidence adduced before them. This is irrelevant to the issue involved in the present proceedings, and the cause of death has to be determined for the purpose of this arbitration upon the evidence adduced before the county court judge.

I am desired by Neville J. to say that he agrees with the view of the Court that the county court judge's decision was right on the evidence before him, and that he does not dissent from their view on the question of the admissibility of the coroner's inquisition and the certificate of death, but that, as that question is not material to the decision of the present case, he prefers not to express any opinion upon it.

BANKES L.J. read the following judgment :—I so entirely agree with the judgment of the county court judge that I really need do no more than express my concurrence not only with the conclusion at which he arrived, but with the reasoning by which he arrived at it. As, however, the points which have been raised and argued are important, I will state shortly the grounds of my decision.

The material facts which the learned judge had proved in evidence before him were as follows : That in case of a fire breaking out upon the premises in which the deceased man met his death dense and suffocating smoke would be produced from the materials stored there. That while the deceased man was on the premises they were wrecked and set on fire by a bomb or bombs from hostile aircraft. That the deceased man was found dead in the basement of the premises buried under the wreckage, but apparently without any indication of external injury upon him. Upon this state of facts Mr. Rigby Swift contended that there was no evidence as to the immediate cause of death, and that it might have been due to any one of four causes—(1.) bodily injury the result of the explosion of the bomb ; (2.) shock due to the force of the explosion ; (3.) shock due to fright ; (4.) suffocation. He urged that a choice between those alternatives was mere conjecture or guesswork. In the case of *Kerr* v. *Ayre Steam Shipping Co.* (1) Lord Shaw draws the

(1) [1915] A. C. 217, 233.

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distinction between conjecture and inference in these words: "The distinction is as broad as philosophy itself. It is that an inference rests upon premises of fact and a conjecture does not." In the case of *Owners of Ship Swansea Vale* v. *Rice* (1), where the unexplained disappearance from a ship at sea of a seaman on duty as officer of the watch was held a sufficient ground for inferring that he accidentally fell overboard and met his death by accident arising out of his employment, Lord Loreburn said: "What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other." And again (2): "If you weigh the probabilities one way or the other, the probabilities are far greater that this man perished through an accident arising out of and in the course of his employment. I am certain that the county court judge was entitled to come to this conclusion."

In the present case there was no evidence suggesting that the deceased man was in weak health, or suffering from heart disease, or that he was timid or nervous, or in any way specially susceptible to shock of either of the kinds suggested, and weighing the probabilities, as he was entitled to weigh them, the county court judge was, in my opinion, justified in coming to the conclusion that the cause of the deceased man's death was suffocation. If so, he was, I think, also justified, as a matter of law, in coming to the conclusion that the deceased man was exposed in a special way to the common danger, so as to take the case out of the class of cases of which *Allcock* v. *Rogers* (3) is the latest instance. For these reasons the appeal, in my opinion, fails.

This conclusion renders it unnecessary to give any decision upon the point taken by Mr. Powell, for the respondent, that the coroner's inquisition and the depositions of the witnesses before the coroner and the certificate of death were admissible in evidence as to the cause of death and were wrongly rejected by the county court judge. As the question has been raised and fully argued, I will give my opinion upon it. The question arose in this way: During the hearing of the case it became apparent that the applicant's chance of success depended on her being able to satisfy the county court

(1) [1912] A. C. 238, 239.
(2) Ibid. 240.
(3) (1918) 34 Times L. R. 324; [1918] W. N. 96.

judge that the cause of the deceased man's death was suffocation. The doctor who had examined the body and had given evidence at the inquest had died before the arbitration was held. Counsel for the applicant tendered the inquisition and the doctor's deposition as evidence of the cause of death. These were rejected by the learned county court judge.

The ground upon which it was contended that these documents were admissible was that they were public documents within the rule laid down by Lord Blackburn in *Sturla* v. *Freccia*. (1) Some authorities were referred to by Mr. Powell in support of his contention. So far as the authorities are concerned, I think that it may be said of them that they disclose that many years ago there was considerable difference of judicial opinion on the question as to the admissibility both of depositions taken before a coroner and a coroner's inquisition, but no established rule. In the case of *Rex* v. *Inhabitants of Eriswell* (2) Buller J. speaks of a deposition before a coroner as having been long settled to be good evidence, and Lord Kenyon apparently concurred in this view. In *Reg.* v. *Gregory* (3) it is difficult to discover from the report the exact grounds of the decision. The Court undoubtedly held that the coroner's inquisition was admissible in evidence for some purpose, but I think that it is clear that none of the judges who composed the Court were prepared to hold that the inquisition was admissible as proof of all the statements contained in it. Mr. Powell was I think prepared to admit that, whatever the practice may have been in former times, it was now a well established rule, so far as the depositions taken before a coroner are concerned, to treat them as inadmissible unless they comply with all the requirements of the Indictable Offences Act, 1848. The rule is so stated in Halsbury's Laws of England, vol. 8, title "Coroners" (Inquests), p. 291, par. 665. Mr. Powell therefore did not press his case with regard to the doctor's deposition, but he contended that the inquisition stood upon a different footing. I cannot agree with this contention. So far as my own experience is concerned, both in civil and criminal Courts, the practice has certainly been to refuse to admit the coroner's inquisition as evidence of the cause of death where the cause of death is the issue which has to be

(1) 5 App. Cas. 623.
(2) (1790) 3 T. R. 707.
(3) 15 L. J. (M.C.) 38; 8 Q. B. 508.

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determined by the Court or the jury. To hold otherwise wou'd lead to extraordinary results. For instance, a prisoner committed by the justices for murder and upon the coroner's inquisition for manslaughter would upon his trial for murder be entitled to put in evidence as proof of his innocence of murder the coroner's inquisition finding him guilty of manslaughter only.

In my opinion the finding of the coroner's jury as to the cause of death was not relevant to any issue which the learned county court judge had to determine. He had to decide upon the evidence before him what the cause of death was. It cannot be relevant to that inquiry that he should be informed what a coroner's jury thought of the matter upon materials which were before them but which were not and could not be placed before the county court judge.

Though having only an indirect bearing upon the point, it is, I think, material to notice that s. 4 of the Coroners Act, 1887, deals with the duties of the jury under two separate headings. There is first their duty as laid down in sub-s. 3, and this would seem to be what is referred to by Lord Tenterden in *Garnett* v. *Ferrand* (1) as being in the nature of a preliminary inquiry. There is also the duty laid down in sub-s. 4 to inquire and find the particulars for the time being required by the Registration Acts to be registered concerning the death. The combined effect of s. 9 of 37 & 38 Vict. c. 88 and s. 17 of 6 & 7 Will. 4, c. 86, is that one of the particulars which is required to be registered is the cause of death. By s. 18, sub-s. 3, of the Act of 1887 the coroner is required to send to the registrar of deaths such certificate of the finding of the jury as is required by the Registration Acts. Sect. 38 of 6 & 7 Will. 4, c. 86, and s. 38 of 37 & 38 Vict. c. 88 provide that certified copies of entries in the register of births and deaths shall be evidence of such births or deaths. The question which was raised and decided with reference to a birth certificate in the cases of *In the Estate of Goodrich* (2), *Wilton & Co.* v. *Phillips* (3), and *Brierley* v. *Brierley* (4) had reference to the date of the event recorded in the certificate. I express no opinion upon that point, but, in so far as the general statement in the law

(1) 6 B. & C. 611, 626.
(2) [1904] P. 138.
(3) 19 Times L.R. 390.
(4) [1918] W. N. 204; since reported [1918] P. 257.

in those cases might cover a case of the cause of death, I do not agree with them. In my opinion the county court judge was right in rejecting the evidence.

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Appeal dismissed.

Solicitors: *Hair & Co.; Braby & Waller.*

W. I. C.

COMMISSIONERS OF INLAND REVENUE, APPELLANTS *v.* NORTH AND INGRAM, RESPONDENTS.

1918 *June* 25.

Revenue—Excess Profits Duty—Exception—Profession dependent mainly on personal Qualifications—Comparatively small Capital required—Preparatory Boarding School Master—Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 39.

By s. 39 of the Finance (No. 2) Act, 1915, "The trades and businesses to which this part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting . . . . (*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount . . . ."

The respondents, who were preparatory boarding-school masters, had purchased the freehold of the school premises for 18,000*l.*, the furniture and fixtures for 1497*l.*, and the goodwill for 3800*l.*, and both of them had the personal qualifications necessary for conducting the business. Their profits for the year ending December 31, 1914, were 2509*l.*, and having been assessed to excess profits duty they appealed to the Special Commissioners for Income Tax and adduced evidence that it was not necessary for a preparatory boarding-school master to own the freehold of the premises, as they could be obtained on a lease giving the necessary fixity of tenure, and that the saleable goodwill was largely dependent on the personal qualifications of the master. The Special Commissioners accepted the respondents' evidence, and were of opinion that the profession or business required definite personal qualifications, and they determined that it was a profession within par. (*c*) of the above section, that no distinction could be made on the ground that the respondents were the owners of the premises, and that they were not liable to excess profits duty:—

Held, that as it was not necessary for a preparatory boarding-school master to own the freehold of the premises, the capital

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expenditure on that head could be disregarded, and that as the only capital expenditure required was small in comparison with the personal qualifications necessary for carrying on the profession successfully, the decision of the Special Commissioners was right.

CASE stated by the Special Commissioners for Income Tax on an appeal by the respondents against a charge of 51*l.* excess profits duty for the year ending December 31, 1914.

The respondents owned and carried on in partnership at Farnborough the profession or business of preparatory boarding-school masters, consisting in the provision of all that was necessary to prepare boys between the ages of eight and fourteen for entering the Royal Naval College at Osborne or a public school. The parents and guardians of the boys made inclusive payments for the board and lodging and care of the boys and for their training and education. Some small extra payments were also made for tuition in additional subjects and for books and stationery.

The respondents purchased the business in 1906, paying 18,000*l.* for the freehold of the premises, 1497*l.* for furniture and fixtures, and 3800*l.* for goodwill.

Both the respondents had the personal qualifications necessary for conducting the business of a preparatory boarding-school master, and took an active part in teaching and in supervising games and in organizing the discipline and arrangements of the school.

The staff consisted of (*a*) residents: four masters, one matron, one lady housekeeper, and fourteen indoor servants; (*b*) non-residents: one master, one sergeant instructor, one carpenter instructor, and gardeners and others employed on the grounds.

The profits for the year ending December 31, 1914, were 2509*l.*

At the hearing the respondent Ingram stated that it was not necessary for a preparatory boarding-school master to be the owner of the premises, as they could be obtained on a lease giving the necessary fixity of tenure, but that an owner enjoyed greater freedom in the development of the business. The respondents admitted that it was necessary to provide furniture and fittings, and that a preparatory boarding-school master was usually the owner of these articles. They also stated that the saleable goodwill was largely dependent on the personal qualifications of the master.

The respondents claimed to be entitled to the exemption in par. (*c*) of s. 39 of the Finance (No. 2) Act, 1915. (1)

The Special Commissioners accepted the evidence of the respondents, and were of opinion that the profession or business required definite personal qualifications, and they determined that it was a profession within par. (*c*) and that no distinction could be made on the ground that the respondents were the owners of the premises, and they decided in favour of the respondents.

Sir Frederick Smith A.-G. and *T. H. Parr* for the appellants.
Gore-Browne K.C. and *A. M. Latter* for the respondents.

SANKEY J. This case raises the question whether the respondents, who are preparatory boarding-school masters, are liable to pay excess profits duty, and the answer to that question depends on whether they are engaged in a profession within par. (*c*) of s. 39 of the Finance (No. 2) Act, 1915, which excepts from liability to the duty "any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount." It is true that the respondents have invested a considerable amount of capital in the school, but in my opinion the words "no capital expenditure is required or only capital expenditure of a comparatively small amount" do not refer to the capital actually being used, but refer generally to the capital expenditure required for a profession of the kind referred to in par. (*c*). For example, it is stated in this case that although it is better for the schoolmaster to own the freehold of the premises, and although the respondents, as it happened, did own the freehold, they might easily have had a long lease, in which case the capital expenditure would have been very much less. Again, in some

(1) The Finance (No. 2) Act, 1915, s. 39: "The trades and businesses to which this part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting . . . . (*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount. . . . ."

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professions it may be necessary to have a library which could be purchased for a few hundred pounds, but if a person engaged in such a profession has an exceptionally luxurious library the larger expenditure thereby involved is not required for the exercise of the profession and is merely an expenditure incurred for the person's own gratification.

Having arrived at the conclusion that the words " capital expenditure " do not mean the actual capital expenditure but are a hypothetical expression, I now turn to the question whether this is a profession the profits of which are dependent mainly on the personal qualifications of the persons by whom it is carried on. In my opinion it is, and the Special Commissioners appear to have so found. It is easy to imagine that if the respondents were replaced by others who had no experience as schoolmasters or who could not be trusted to maintain discipline this successful school would lose its connection. The profession of training the young, above all other professions, depends almost wholly on the qualifications of the person exercising it, particularly where the pupils are not merely day scholars but live with the schoolmaster, who in term time is in the position of a guardian. It is quite unnecessary for such a person to incur a large capital expenditure, and the true interpretation of the section is that one must contrast the importance of the capital expenditure with the personal qualifications which are possessed by the persons using it. Which is it that produces the profits in this case ? As it is entirely unnecessary to have freehold premises, I do not think it necessary to take into account the fact that the freehold cost 18,000*l*. The true comparison is between the small amount spent on furniture and fixtures and on purchase of the goodwill, and the personal qualifications of the respondents. In my opinion this is a profession in which only capital expenditure of a comparatively small amount is required. The chief requirement consists of the skill and experience which the respondents are admitted to possess. The decision of the Special Commissioners was therefore right and the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants : *Solicitor of Inland Revenue.*

Solicitors for respondents : *Hopgood, Mills & Somerville.*

J. S. H

COMMISSIONERS OF INLAND REVENUE, APPELLANTS *v.* WILLIAM RANSOM & SON, LIMITED, RESPONDENTS. 1918 *June* 25.

Revenue—Excess Profits Duty—Exception—Husbandry—Manufacturing Chemists—Cultivation of Herbs for Treatment in Factory—Finance (No. 2) Act, 1915 (5 *& 6 Geo.* 5, *c.* 89), *s.* 39.

By s. 39 of the Finance (No. 2) Act, 1915, "The trades and businesses to which this part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting—[inter alia] husbandry . . . ."

The respondents, who were a limited company carrying on business as manufacturing chemists and growers of medicinal and other herbs, owned a factory where the manufacture and distillation of herbs were carried on, and they also occupied a farm on which they grew herbs for treatment in the factory. Memoranda were kept of the value of the produce transferred to the factory, of the prices obtained by the sale of incidental crops to the public, and of the expenses relating to the farm operations. The respondents were assessed to excess profits duty, and on an appeal by them against the assessment the General Income Tax Commissioners found as a fact that the respondents occupied the farm mainly for the purpose of the factory, but they were of opinion that the occupation of the farm was the business of husbandry, and that the profits of the farm should be excluded for the purpose of excess profits duty, and they fixed the assessment on this basis :—

Held, (1.), that on the facts there was evidence on which the General Commissioners could find that the company was engaged in husbandry, and (2.) that as it was possible for the Commissioners to separate the business of husbandry from the other business, there was nothing in law to prevent them from doing so.

CASE stated by the General Income Tax Commissioners for the division of Hitchin on an appeal by the present respondents against an assessment of 531*l.* for the year ending December 31, 1914, in respect of excess profits duty.

The respondent company was incorporated under the Companies (Consolidation) Act, 1908, to carry on (inter alia) the business of manufacturing chemists and growers of medicinal and other herbs. The company owned a freehold factory, where the manufacture and distillation of herbs were carried on, and they also occupied under a lease a farm, originally 30 acres in extent and subsequently increased

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to 70 acres, on which they grew herbs for treatment in the factory. In the company's accounts no distinction was made between the results of growing the herbs and of their distillation and sale, but one of the directors kept memoranda of the value of the produce transferred to the factory, of the prices obtained by the sale of incidental crops to the public, and of the expenses relating to the farm operations. The value of the produce transferred to the distillery was between 250*l.* and 300*l.* in the year, and the value of that disposed of in other ways was between 100*l.* and 130*l.*

In computing the profits of the company under Sched. D of the Income Tax Acts, the profits were viewed as a whole, and a deduction of 22*l.* 17*s.* was made therefrom for the occupation of the farm for the year 1914–15, this being the sum assessed in respect of the farm under Sched. B.

The company claimed, for the purposes of excess profits duty, to exclude the profits of the farm on the ground that they were derived from the trade or business of husbandry, and that this trade or business was separate from the manufacture of chemicals and drugs.

For the Crown it was contended that the company's business was one business, and that there was no authority under the Finance (No. 2) Act, 1915, for the division of one business into parts.

The General Commissioners found as a fact that the company occupied the farm in connection with and mainly for the purpose of the factory in which the herbs grown on the farm were treated, but they were of opinion that the occupation of the farm was the business of husbandry, and that the profits of the farm should be excluded for the purpose of excess profits duty, and on this basis (after making other agreed deductions) they reduced the assessment to 75*l.* (1)

Sir Frederick Smith A.-G. and *T. H. Parr* for the appellants. The growing of herbs for treatment in the respondents' factory is not husbandry within the section. Husbandry was excepted for reasons

(1) The Finance (No. 2) Act, 1915, s. 39: "The trades and businesses to which this part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting—[inter alia] husbandry . . . ."

of policy in order to encourage the production of home-grown food. Apart from the exceptions the object of the Legislature was to throw a net which should be as wide as possible. The words of a statute should be interpreted in accordance with the object which the Legislature had in view: Maxwell on the Interpretation of Statutes, 4th ed., p. 78. The exception of husbandry was only intended to apply to the ordinary farming classes. Sect. 18 of the Customs and Inland Revenue Act, 1887, which enacts that "any person occupying lands for the purposes of husbandry only" may elect to be assessed to income tax under Sched. D instead of Sched. B, has the marginal note "Farmer may elect to be charged under Schedule D." Similarly s. 23, sub-s. 1, of the Customs and Inland Revenue Act, 1890, which speaks of persons "in the occupation of lands for the purpose of husbandry only," has in the marginal note the word "farmers." In the Income Tax Acts the word "husbandry" always means ordinary farming. Chambers' Dictionary defines husbandman as "a working farmer, one who labours in tillage," and husbandry as "the business of a farmer, tillage." The Oxford English Dictionary says that a husbandman is "a man who tills or cultivates the soil, a farmer," and that husbandry means "tillage or cultivation of the soil, (including also the rearing of live stock . . . .); agriculture, farming."

Secondly, even if the respondents are carrying on the business of husbandry, it is only a subsidiary business. The separation of a subsidiary business from the principal business is not authorized by the Finance (No. 2) Act, 1915. As the respondents are not carrying on an independent business of husbandry, the profits arising from the farm are liable to the duty. Sect. 26, sub-s. 5, of the Finance Act, 1917, shows that two businesses connected in this way are to be treated as one business.

Hon. W. Finlay K.C. and *A. M. Latter* for the respondents. The appellants cannot succeed unless they can show that the General Commissioners have made a mistake in law. It cannot be said that the General Commissioners made any mistake in law by holding that the respondents used this farm for husbandry. The farm was used not only to grow herbs for the factory, but also to produce crops, which were sold to the public. "Husbandry" includes everything connected with the growing of crops. If policy is to be looked at,

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the production of drugs is as important as that of crops. "Husbandry" is not confined to ordinary farming. It includes the cultivation of a market-garden: *Meux* v. *Cobley*. (1)

With regard to the second point, the respondents' two businesses were not so connected that the profits could not be separated. There is no rule of law that the sum total of the activities of a limited company constitutes only one business: per Lord Parker in *Mitchell* v. *Egyptian Hotels, Ld.* (2) The General Commissioners have solved the problem of separating the profits of the two businesses. It makes no difference which is the main business and which the subsidiary business.

Sir Frederick Smith A.-G. in reply. The respondents have substantially only one business, and an auxiliary branch of that business cannot be separated from the rest for revenue purposes.

SANKEY J. Excess profits duty is imposed by ss. 38 and 39 of the Finance (No. 2) Act, 1915. The net thrown is a very wide one and has very close meshes, but certain exceptions are created by s. 39, and those exceptions include "husbandry." The first question, therefore, is whether the respondents were carrying on the trade or business of husbandry. The contention for the Crown is that the respondents' business, taken as a whole, is that of manufacturing chemists. It is not very useful to refer to dictionary definitions of "husbandry" or to endeavour to draw any inference from the way in which the term is used in other statutes to which my attention has been drawn, and I notice these matters simply to show that I have not passed them over. The contention for the Crown is that husbandry means farming and that it is impossible to say that persons who grow herbs in the circumstances of the present case are farmers. I do not agree with that contention. I think that "husbandry" is a term of very wide signification, and though I am not prepared to hold that a man who tills and cultivates the soil is in all circumstances a husbandman or a man engaged in husbandry, I can see no distinction between a man who does so in order to produce food for human consumption and a man who does so in order to produce medicines and drugs, also for human consumption. Beyond that, the questionwhether a man

(1) [1892] 2 Ch. 253. (2) [1915] A. C. 1022, 1038.

is engaged in husbandry is very much a question of fact and of degree, and such questions are for the Commissioners hearing the appeal against the assessment.

I have no right to reverse their decision unless I can say that there was no evidence that the respondents were engaged in husbandry. It is to be observed that not merely is produce transferred from the respondents' farm to their factory, but incidental crops are also sold to the public. I think that the respondents were engaged in husbandry, i.e., in tilling the soil and producing from it commodities for human consumption. As to the policy that lies behind the Act, if I am entitled to consider the question of policy it is to be remembered that drugs are at the present time a primary necessity and it is good policy to encourage their production equally with the production of food, and therefore the argument from policy tells as much against the contention for the Crown as in favour of it. I think that the decision of the General Commissioners on the first question was right, and that I cannot interfere with it.

The second question is whether the General Commissioners had any authority to separate the business of husbandry from the other business carried on by the respondents. This question is one of some difficulty. It is said for the Crown that there is no authority for separating the subsidiary business of husbandry from the main business of manufacturing drugs and for saying that the respondents are not liable to excess profits duty in respect of the business of husbandry while they are liable to the duty in respect of their main business. I can conceive of cases where the two branches of the business of a person or a company are so interlaced that it is impossible to separate them, and, although I express no definite opinion upon the point, it may be that in those circumstances, if the main branch of the business is subject to excess profits duty, the whole business is subject to the duty on the ground of the impossibility of separating the main branch from the rest of the business. There, again, the decision would depend very much on the facts of the case. The case where an individual carries on two separate businesses, of which one is liable to the duty and the other is not, is a simple one, but it might be more difficult to arrive at a decision where the one business is ancillary and incidental

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to the other in such a way as to make them nearly inseparable. The same considerations apply in the case of a company as of an individual, as is shown by the dictum of Lord Parker in *Mitchell* v. *Egyptian Hotels, Ld.* (1) If a company were engaged in two separate businesses it might be clearly liable to pay excess profits duty on one business and not on the other. The difficulty only arises where the two businesses converge and one business is ancillary to the other. But the difficulty is largely one of fact, and where it is possible to separate the businesses there is nothing in law to prevent this from being done, and in the result one of the businesses may not be subject to duty. It has been done by the General Commissioners in this case, and the result is that there must be judgment for the respondents.

Appeal dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitor for respondents: *R. C. Swaine.*

(1) [1915] A. C. 1022, 1038.

J. S. H.

COMMISSIONERS OF INLAND REVENUE, APPELLANTS *v.* MAXSE, RESPONDENT.

1918
June 25, 26.

Revenue—Excess Profits Duty—Exception—Profession—Profits dependent on personal Qualifications—Proprietor of Magazine—Articles mostly written by himself—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 39.

By s. 39 of the Finance (No. 2) Act, 1915, "The trades and businesses to which this part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting . . . . (*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount . . . ."

The respondent purchased a monthly magazine for 1500*l.* and was the sole proprietor, editor, and publisher thereof. The earnings were derived from sales of the magazine, from advertisements, and from reprints of articles mostly written by the respondent. Before the war the respondent wrote a large part of each number, and, though the bulk of the matter was contributed by others, the sales were largely due to the popularity of the respondent's own writings. When war broke out the respondent greatly increased his personal contributions and had since continued to do most of the writing. At the present time he required practically no capital. Having been assessed to 1000*l.* excess profits duty for the year ending May 31, 1915, the respondent appealed to the General Income Tax Commissioners and contended that the profits were earned by reason of his personal qualifications, that the capital expenditure was small in comparison with the personal qualifications required to earn the profits, and that he was exempt from excess profits duty by virtue of par. (*c*) of the above section. The General Commissioners held that the respondent was exempt from the duty and they discharged the assessment:—

Held, that as the respondent was not in the position of an ordinary journalist receiving remuneration for articles contributed to the Press, but derived his profits from the sale of a commodity and was carrying on an ordinary commercial business, there was no evidence that he was carrying on a profession within par. (*c*), and therefore he was liable to pay excess profits duty.

CASE stated by the General Income Tax Commissioners for the division of St. Paul, Covent Garden, in the city of Westminster, on

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an appeal by the respondent against an assessment of 1000*l.* excess profits duty for the year ending May 31, 1915.

In 1893 the respondent purchased the monthly magazine known as the *National Review* for 1500*l.*, and since then he had been the sole proprietor, editor, and publisher. The assessment in question was on the profits of this publication.

The earnings were derived from sales of the magazine, from advertisements, and from reprints of articles which had practically all been written by the respondent. The outgoings included payments to contributors, cost of paper and printing, advertising, rent and office expenses. The respondent bought the paper, and had the magazine printed for him by an independent contractor. The respondent employed a manager at 250*l.* a year, and two clerks, who did the advertisement canvassing and account keeping. The rent of the office was now 63*l.* a year. The distribution of the magazine was effected through wholesale houses.

Before the war the respondent wrote a large part of each monthly number, and, though the bulk of the matter was contributed by others, the sales were largely due to the popularity of the respondent's own writings. When war broke out the respondent greatly increased his personal contributions, and had since continued to do most of the writing. At the present time practically no capital was required by the respondent.

The respondent contended that the profits were earned by him by reason of his personal qualifications, that the capital which he had expended was insignificant in comparison with the personal qualifications required to earn the profits, and that he was exempt from excess profits duty by virtue of par. (*c*) of s. 39 of the Finance (No. 2) Act, 1915. (1)

It was contended for the Crown that the income derived from

(1) The Finance (No. 2) Act, 1915, s. 39: "The trades and businesses to which this part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting . . . . (*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount. . . . ."

publishing a magazine was derived primarily from the sale of a commodity, and that the respondent was carrying on a business liable to the duty, as he was not merely a journalist contributing to the Press.

The General Commissioners held that the respondent was exempt from the duty, and they discharged the assessment.

Sir Frederick Smith A.-G. and *T. H. Parr* for the appellants. The respondent is not carrying on a profession. An ordinary journalist no doubt carries on a profession. But the respondent is not an ordinary journalist. He is engaged in a business. A person who becomes proprietor and publisher of a magazine takes up a business, and the profits are liable to excess profits duty, even though his personal qualifications may have contributed to them. It is open to this Court to decide whether the evidence justifies what the General Commissioners have held: per Cozens-Hardy M.R. in *Gramophone and Typewriter, Ld.* v. *Stanley*. (1) When the facts stated are such that it is not possible from them to come to the particular conclusion of fact found, this Court is not bound by the conclusion of fact which the Commissioners have found with no evidence to support it: per Scrutton J. in *Smith* v. *Incorporated Council of Law Reporting for England and Wales*. (2)

Hon. W. Finlay K.C. and *A. M. Latter* for the respondent. The question whether the respondent was carrying on a business or a profession is a question of degree. Some professions, for instance that of a schoolmaster, contain a commercial element. The test is whether the profits are mainly due to capital expenditure or to personal qualifications. That question was for the General Commissioners, and they have not gone wrong on any point of law. A man does not cease to be a journalist because he becomes the proprietor of a magazine in order that he may express his views in it. The observations which have been cited from the judgment of Cozens-Hardy M.R. in *Gramophone and Typewriter, Ld.* v. *Stanley* (1) were commented on by Hamilton J. in *American Thread Co.* v. *Joyce* (3), where he said that the real question was whether there was any evidence in support of the decision of the Commissioners.

(1) [1908] 2 K. B. 89, 95. (2) [1914] 3 K. B. 674, 683.
(3) (1911) 6 Tax Cas. 1, 20-22.

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The observations of Lord Haldane L.C. in the same case in the House of Lords (1) were to the same effect. An inference from a wide area of facts is a finding of fact: per Lord Sumner in *Usher's Wiltshire Brewery* v. *Bruce*. (2)

T. H. Parr replied.

SANKEY J. The question in this case is whether the respondent carried on a profession of the kind indicated in par. (*c*) of s. 39 of the Finance (No. 2) Act, 1915. Broadly speaking, trades are liable to excess profits duty, but professions are exempt, except in the case of a profession which approximates to a trade by reason of its profits being derived from capital expenditure rather than from the personal qualifications of the person by whom it is carried on. In order to determine whether the respondent is entitled to the benefit of the exemption it is necessary to see whether he did in fact carry on a profession, and, if he did, whether it is a profession of the kind indicated in par. (*c*). The case is stated under s. 45 of the Finance (No. 2) Act, 1915, and the only questions for this Court are questions of law. The General Commissioners having set out the evidence and the contentions, have stated their finding very briefly, namely, "that the respondent was exempt from the duty." The appellants thereupon contended that it is open to this Court to decide whether the evidence justifies the finding, and referred to the observations of Cozens-Hardy M.R. in *Gramophone and Typewriter, Ld.* v. *Stanley* (3), where he said: "The question arises on a case stated by the Commissioners. It is undoubtedly true that, if the Commissioners find a fact, it is not open to this Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them, and add that upon such evidence they hold that certain results follow, I think it is open, and was intended by the Commissioners that it should be open, to the Court to say whether the evidence justified what the Commissioners held." I do not think, however, that that passage supports the contention founded upon it. It is not possible for this Court to say that the finding is against the weight of evidence or to find the facts. This Court must accept the facts as stated and decide any question

(1) (1913) 6 Tax Cas. 163. (2) [1915] A. C. 433, 466.
(3) [1908] 2 K. B. 89, 95.

of law arising upon them, including the question whether there is any evidence to support the conclusion of the Commissioners. In *American Thread Co.* v. *Joyce* (1) Lord Haldane L.C. said: "It is not for us to enter into the question how on the materials which came before the Inland Revenue Commissioners we should have dealt with the question of fact." I think, if I may respectfully say so, that the law is correctly stated in that passage, and I do not think that it is in conflict with the observations of Cozens-Hardy M.R. in *Gramophone and Typewriter, Ld.* v. *Stanley.* (2) Those observations must be looked at secundum subjectam materiam, and were really made in reference to the question whether there was any evidence on which the Commissioners could come to the findings of fact at which they had arrived.

I therefore proceed to consider the question whether there was any evidence on which the General Commissioners could arrive at their determination. It is said that the respondent exercises a profession the profits of which are mainly dependent on his own personal qualifications and in which only capital expenditure of a comparatively small amount is required. So far as the latter point is concerned, the General Commissioners appear to have so found. As to the former point, the facts stated by the General Commissioners amount to a finding that the profits of this magazine are mainly dependent on the respondent's personal qualifications. The question therefore remains whether there was any evidence on which the General Commissioners could find that the respondent was exercising a profession. I do not think that in law it can be said that publication of a magazine is the exercise of a profession. It is entirely different from the case of a journalist who sends articles to various papers and is remunerated by the proprietors or publishers and who would clearly be carrying on a profession. The respondent is not in that position. He is not paid for his articles in the same way as a journalist. His remuneration is derived from the sale of a commodity in the open market, namely, the magazine in question. He neither receives the remuneration of an ordinary journalist, nor does he perform the functions of an ordinary journalist. There is no evidence that he is exercising a profession. He is

(1) 6 Tax Cas. 163. (2) [1908] 2 K. B. 89, 95.

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carrying on an ordinary commercial business, and the profits are derived from the sale of a commodity in the open market. The appeal must therefore be allowed.

Appeal allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Preston & Foster.*

J. S. H.

1918
June 27.

WILLIAMSON FILM PRINTING COMPANY, LIMITED APPELLANTS *v.* COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Excess Profits Duty—Deduction—Remuneration of Manager of Business—Discretion of Inland Revenue Commissioners—Appeal—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 45, *sub-ss.* 1, 5; *Sched. IV., Part I., clause* 5.

By s. 45, sub-s. 1, of the Finance (No. 2) Act, 1915, "The excess profits duty shall be assessed by the Commissioners of Inland Revenue . . . ." By sub-s. 5, "Any person who is dissatisfied with the amount of any assessment made upon him by the Commissioners of Inland Revenue under this Part of this Act may (except in cases where a special right of appeal is given under this Part of this Act) appeal to the General Commissioners . . . . or to the Special Commissioners . . . ." By clause 5 of Part I. of the Fourth Schedule to the Act, "Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year or a proportionate part thereof as the case requires, and no deduction shall be allowed in respect of any transaction or operation of any nature, where it appears, or to the extent to which it appears, that the transaction or operation has artificially reduced the amount to be taken as the amount of the profits of the trade or business for the purposes of this Act":—

Held, that under clause 5 the Commissioners of Inland Revenue are the final judges of the question whether any higher deduction should be allowed for the accounting year than for the last pre-war

trade year, and no appeal from their decision on this question is given by s. 45, sub-s. 5.

CASE stated by Special Commissioners for Income Tax on an appeal against an assessment for excess profits duty under Part III. of the Finance (No. 2) Act, 1915, for the year ending March 31, 1915.

The appellants were a private company registered under the Companies (Consolidation) Act, 1908, for the purpose of acquiring a business previously carried on by one Williamson. By the agreement made for the sale of the business on March 31, 1913, it was provided that Williamson should be employed as managing director of the company for five years, at an annual salary of 300*l.* and a commission of 5 per cent. on the net profits earned by the company after payment of the dividend on their preference shares. For the year ending March 31, 1914, Williamson's remuneration amounted to 300*l.* salary and 98*l.* commission. On October 1, 1914, his remuneration was increased to a salary of 500*l.* a year and a commission of 10 per cent. on the net profits, and the total remuneration paid to him for the year ending March 31, 1915 (the accounting period), amounted to 1230*l.* In determining, for the purpose of excess profits duty, the pre-war standard of the company's profits the Commissioners of Inland Revenue allowed a deduction of the sums of 300*l.* and 98*l.* in the computation of the company's profits for the year ending March 31, 1914 (the last pre-war trade year), and in computing the company's profits for the year ending March 31, 1915, they allowed the same deduction and they declined to direct, under the discretion vested in them by clause 5 of Part I. of the Fourth Schedule to the Finance (No. 2) Act, 1915, that the deduction should be increased by any portion of the amount by which the sum of 1230*l.* exceeded the sum of 398*l.*

It was contended for the company that under s. 45, sub-s. 5, of the Finance (No. 2) Act, 1915, they had a right of appeal to the Special Commissioners from the refusal of the Commissioners of Inland Revenue to direct the deduction of an amount exceeding the amount allowed as a deduction in computing the pre-war standard of profits. (1)

(1) The Finance (No. 2) Act, 1915, s. 45, sub-s. 1: "The excess profits duty shall be assessed by the Commissioners of Inland Revenue. . . . ." Sect. 45, sub-s. 5: "Any person who is dis-

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It was contended for the Crown that under clause 5 above mentioned the allowance of any deduction for the remuneration of persons concerned in the management of the business in excess of the deduction allowed for that purpose in the last pre-war trade year was a matter entirely within the discretion of the Commissioners of Inland Revenue, and that their decision on this matter could not be reviewed by the Special Commissioners.

The Special Commissioners were of opinion that they had no power, in the absence of a direction by the Commissioners of Inland Revenue that a deduction should be allowed in excess of the deduction allowed in the last pre-war trade year, to allow any such higher deduction, and while reducing the assessment on other grounds they refused any further deduction on this particular ground.

Sylvain Mayer K.C. and *A. M. Latter* for the appellants. The general right of appeal given by s. 45, sub-s. 5, of the Finance (No. 2) Act, 1915, includes a right of appeal from a refusal by the Inland Revenue Commissioners to give a direction under clause 5 of Part I. of the Fourth Schedule. In *Rex* v. *Inland Revenue Commissioners* (1), where clause 5 was in question, the Attorney-General

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satisfied with the amount of any assessment made upon him by the Commissioners of Inland Revenue under this Part of this Act may (except in cases where a special right of appeal is given under this Part of this Act) appeal to the General Commissioners for the division in which he is assessed, or to the Special Commissioners, and those Commissioners shall have power on any appeal, if they think fit, to summon witnesses and examine them upon oath. . . . ." Clause 5 of Part I. of the Fourth Schedule: "Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not, unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct, exceed the sums allowed for those purposes in the last pre-war trade year or a proportionate part thereof as the case requires, and no deduction shall be allowed in respect of any transaction or operation of any nature, where it appears, or to the extent to which it appears, that the transaction or operation has artificially reduced the amount to be taken as the amount of the profits of the trade or business for the purposes of this Act."

(1) [1918] 1 K. B. 143.

reserved his right to contend that a mandamus would not lie to the Commissioners. That contention could only be based on the existence of a right of appeal. The appeal given by s. 45, sub-s. 5, is an appeal from the amount of any assessment made "under this Part of this Act." The Fourth Schedule is to be read as if it formed a portion of that part of the Act.

Sir Gordon Hewart S.-G. and *T. H. Parr* for the respondents. Clause 5 of Part I. of the Fourth Schedule gives the Inland Revenue Commissioners an absolute discretion: *Rex* v. *Inland Revenue Commissioners.* (1) A direction by them is a condition precedent to the allowance of a higher deduction. In the case cited the basis of the Attorney-General's reservation of the right to contend that no mandamus would lie was not the existence of a right of appeal, but the fact that the Commissioners are servants of the Crown: see *Reg.* v. *Inland Revenue Commissioners.* (2) It is clear that the reason why the applicants in that case applied for a mandamus was because their advisers took the view that there was no appeal. It would be impossible for the discretion given by clause 5 to the Commissioners themselves to be exercised by any other body. The Crown cannot appeal from the Commissioners' exercise of discretion under clause 5, and there cannot be a one-sided right of appeal. This is not the only instance where the Act makes the Commissioners the final judges: see s. 38, sub-s. 2, and s. 42. It is assumed by s. 49, sub-s. 2, of the Finance Act, 1916, that the Commissioners are the only tribunal that can allow a higher deduction under clause 5.

Sylvain Mayer K.C. replied.

SANKEY J. In this case the question is whether there is an appeal to the Special Commissioners from the refusal of the Commissioners of Inland Revenue to direct a greater deduction in respect of a managing director's remuneration than the sum allowed for that purpose in the last pre-war trade year. Sect. 45, sub-s. 5, of the Finance (No. 2) Act, 1915, gives a right of appeal to the General or Special Commissioners to any person who is dissatisfied with the amount of any assessment made upon him by the Commissioners of Inland Revenue, except where a special right of appeal is given, and it is contended that those words are so wide as to cover

(1) [1918] 1 K. B. 143. (2) (1888) 21 Q. B. D. 569.

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every possible case. Now the decision of the Commissioners of Inland Revenue as to the deduction to be allowed for a managing director's remuneration is given under clause 5 of Part I. of the Fourth Schedule to the Act, and the question is whether that clause is so framed as to contain a clear and certain indication that the Commissioners of Inland Revenue are to be the sole and final judges in this matter. The clause is somewhat peculiar, and it appears to be a definite prohibition against the allowance of any deduction of the kind referred to, unless the Commissioners of Inland Revenue direct the deduction; in other words, such a direction is a condition precedent to the allowance of the deduction, and the discretion of the Commissioners of Inland Revenue is absolute and unappealable. The question was raised in argument whether in the converse case, namely, where the Commissioners of Inland Revenue have directed a higher deduction than the sum allowed in the last pre-war trade year, it would be open to the Crown to appeal to the General or the Special Commissioners. I think not. The Commissioners of Inland Revenue are the final judges in this matter. The Solicitor-General has pointed out other cases where he says that the Commissioners of Inland Revenue are made the final judges. Different considerations may apply to those cases, and I do not express any opinion upon them. The view which I take of this case is that which the Court of Appeal apparently took in *Rex* v. *Inland Revenue Commissioners*. (1) That was a case where a mandamus was applied for to compel the Commissioners of Inland Revenue to allow a higher deduction than the sum allowed in the last pre-war trade year, and Swinfen Eady L.J. said (2): "It is clear that no deduction is to be allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business exceeding the pre-war rate unless the Commissioners otherwise direct." He also said (3): "No deduction is to be allowed exceeding the pre-war rate unless the Commissioners otherwise direct," and "Be that as it may, I am satisfied that taking the words in their natural and ordinary sense and meaning they confer a discretion upon the Commissioners where there are special circumstances, or where the directors' remuneration depends on profits, to

(1) [1918] 1 K. B. 143. (2) Ibid. 145.
(3) Ibid. 147.

direct what sum, if any, is to be allowed in respect of an additional deduction." Swinfen Eady L.J. clearly took the view that the clause gave the Commissioners of Inland Revenue an absolute discretion. I think, therefore, that there is no appeal from the Commissioners of Inland Revenue in this matter, and this appeal from the Special Commissioners must be dismissed.

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Appeal dismissed.

Solicitors for appellants: *Billinghurst, Wood & Pope, for G. F. Clarke, serving with His Majesty's Forces.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

J. S. H.

WEISS, BIHELLER & BROOKS, LIMITED, APPELLANTS *v.* FARMER (SURVEYOR OF TAXES), RESPONDENT.

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June 27; July 5.

Revenue—Income Tax—Chargeability of Agent of Foreign Company—Contract—Whether Agency or Sale—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 41.

By s. 41 of the Income Tax Act, 1842, ". . . . Any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of . . . . any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof . . . ."

The appellants were an English limited company carrying on business in London as manufacturers and sellers of incandescent and other mantles, and, under an agreement with a Dutch company called the Ramie Union, were the sole sellers in the United Kingdom of the goods manufactured by the Ramie Union, which had its head office in Holland, where its books were kept and its general business transacted. The appellants' transactions with the Ramie Union formed only a small part of the appellants' business. Under the agreement the Ramie Union manufactured mantles and added to the cost 10 per cent. for expenses, and the appellants sold the mantles in England at the best possible price. The appellants were entitled to 5 per cent. for their expenses and the del credere, and the profits were divided. The appellants agreed to keep a separate day-book showing the selling prices, and this book was to be open to the directors of the Ramie Union. The name of the Ramie Union did not appear on the invoices sent by

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the appellants to their customers in England, but the appellants' premises had on them the name of the appellants as agents for the Ramie Union, though it was not proved that this had been authorized by the Ramie Union. An assessment to income tax was made on the appellants as agents for the Ramie Union in respect of profits derived by the Ramie Union from carrying on the trade of vendors of gas mantles within the United Kingdom, and on appeal the General Commissioners confirmed the assessment:—

Held, that there was evidence on which the General Commissioners could find that the Ramie Union was carrying on trade within the United Kingdom and on which they could find that the appellants were the agents of the Ramie Union within the meaning of the above section, and the decision of the General Commissioners must be affirmed.

CASE stated by General Commissioners for Income Tax.

The appellants appealed to the General Commissioners against assessments made under Sched. D of the Income Tax Acts upon the appellants as agents for the Ramie Union in respect of profits derived by the Ramie Union from carrying on the trade of vendors of gas mantles within the United Kingdom. The assessments were for the years ending April 5, 1913, 1914, 1915, and 1916.

The Ramie Union was a Dutch limited company whose business consisted in the manufacture and sale of incandescent gas mantles, and had its head office at Enschede in Holland, where all its board meetings were held, its books kept, and banking and general business transacted. The Ramie Union held no shares in the appellant company, and no shares in the Ramie Union were held either by the appellant company or by any of its shareholders.

The appellant company was an English company incorporated under the Companies (Consolidation) Act, 1908, on July 1, 1913, to acquire a business of manufacturers and sellers of incandescent mantles and other mantles, till then carried on by Weiss & Biheller in London, and had its registered office at 70 and 71, Chiswell Street, London.

The appellants carried on a large business as glass importers and hardware merchants, and the transactions with the Ramie Union formed only a small part of the appellants' business.

In 1907 the appellants' predecessors began to buy from the Ramie Union gas mantles and other articles manufactured by the Ramie Union under an arrangement by which the appellants' predecessors

agreed to buy up to a million mantles in return for an agreement by the Ramie Union to sell to no other person in the United Kingdom.

On July 13, 1909, the following agreement was made between the appellants' predecessors and the Ramie Union in order to regulate prices :—

"1. The Ramie Union undertake to sell their manufactures to Weiss & Biheller, London, at a price so calculated that to the absolute cost an expenses percentage of 10 per cent. is added and no further profit is included in the price, and a detailed calculation of each article is to be put before Weiss & Biheller.

"2. If in the course of manufacture it should show that articles are produced at a lower price than at first calculated, Weiss & Biheller are to be informed of this reduction at once and goods are to be charged on the basis of this new price.

"3. If in course of manufacture it should show that the manufacture of an article is dearer, then Weiss & Biheller are to be informed. The Ramie Union is obliged to execute orders for such articles which have already been accepted, whilst new articles must be transmitted at the new price.

"4. Should it be in the interest of both parties that a lower percentage than the 10 per cent. should be calculated to get orders for certain articles, then by mutual agreement a lower percentage may be reckoned.

"5. If there should be a reduction in the price of thorium and other raw materials, the benefit of such reduction must come to Weiss & Biheller automatically, as the reduced cost affects the calculation.

"6. Weiss & Biheller sell the goods which they receive from the Ramie Union at the best possible prices, and will keep a separate day-book showing these selling prices, which is open to the authorized directors of the Ramie Union at any time.

"7. The profit which arises through selling the articles at higher prices than charged by the Ramie Union is to be divided in this way : Weiss & Biheller deduct 5 per cent. commission on the turnover for their general business expenses and the del credere ; after deducting this commission the remaining difference between purchase prices from the Ramie Unuion and the sale prices by Weiss &

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Biheller will be equally divided between both parties and accounted for half-yearly.

"8. On the other hand Weiss & Biheller receive half the profit which the Ramie Union may make by selling to other customers (not English) at higher prices or by making a saving on the 10 per cent. manufacturing expenses. The profit of the Ramie Union will be ascertained after stock-taking and closing of books as heretofore.

"9. If there should be losses to the Ramie Union or to Weiss & Biheller, neither of the contracting parties bears part of such losses of the other party. The del credere will be borne altogether by Weiss & Biheller, and such losses must not be set off from the profit of Weiss & Biheller. Allowance for bad manufacture or mistakes owing to the fault of the Ramie Union is debited to them.

"This agreement is for one year from May 1, 1909, to May 1, 1910. The Ramie Union has to give at once new prices for the various kinds of mantles on the basis of the previously mentioned calculations."

It was agreed on January 17, 1911, that the manager of the Ramie Union should receive in addition to his salary 10 per cent. out of the remaining difference referred to in paragraph 7 of the first agreement.

A further agreement was made on March 28, 1912, extending the previous agreements to March 28, 1917, the contracts to continue from year to year unless notice was given by either party six months before the expiration of any such annual period.

Weiss & Biheller and the appellant company to whom the agreements now applied had been in fact the sole sellers in the United Kingdom and the British Dominions of the goods manufactured by the Ramie Union.

The appellant company from time to time ordered from the Ramie Union a sufficient quantity of gas mantles to meet orders and as additions to stock. The Ramie Union invoiced the goods to the appellant company at the manufacturing cost plus 10 per cent. as agreed. The appellant company sold at the best prices which they could obtain, the difference being the gross profit, out of which the appellant company took the 5 per cent. commission referred to in paragraph 7 of the first agreement, the balance being divided as

follows :—10 per cent. to the manager of the Ramie Union, 45 per cent. to the Ramie Union, and 45 per cent. to the appellants.

The invoices for the goods sold were made out and sent by the appellants to the customers, the name of the Ramie Union never appearing on any of the trade documents as the vendors of those goods.

On brass plates affixed to the appellants' premises the appellants were described as the agents of the Ramie Union, and in the Post Office Directory for 1916 the London address of the Ramie Union was given by the authority of the appellants as 70 and 71, Chiswell Street, but it was not proved that the authority of the Ramie Union was given for either of these things.

It was contended for the appellants that the Ramie Union traded not within but with the United Kingdom, and that the appellants were not agents of the Ramie Union within s. 41 of the Income Tax Act, 1842 (1), but were purchasers from the Ramie Union.

The Commissioners confirmed the assessments.

Hon. W. Finlay K.C. and *A. M. Latter* for the appellants.

Sir Gordon Hewart S.-G. and *T. H. Parr* for the respondent.

[The following cases were cited in argument :—*Erichsen* v. *Last* (2), *Grainger & Son* v. *Gough* (3), *Watson* v. *Sandie and Hull* (4), *Crookston Brothers* v. *Furtado* (5), *Macpherson & Co.* v. *Moore* (6), *Ex parte White* (7), *Delage* v. *Nugget Polish Co.* (8), and *Englebert Tyres, Ld.* v. *Victor Tyre Co.* (9)]

(1) The Income Tax Act, 1842, s. 41: ". . . . Any person not resident in Great Britain, whether a subject of her Majesty or not, shall be chargeable in the name of . . . . any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof . . . ."

The Income Tax Act, 1853, s. 2, enacts that the duties shall be deemed to be granted (Sched. D) "in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom."

(2) (1881) 8 Q. B. D. 414.
(3) [1896] A. C. 325.
(4) [1898] 1 Q. B. 326.
(5) (1910) 5 Tax Cas. 602.
(6) (1912) 6 Tax Cas. 107.
(7) (1871) L. R. 6 Ch. 397.
(8) (1905) 92 L. T. 682.
(9) Unreported.

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July 5. SANKEY J. read the following judgment:—In this case Messrs. Weiss, Biheller & Brooks, Limited, appeal against several assessments made under Sched. D of the Income Tax Acts on them as agents for the Ramie Union in respect of profits derived by the Ramie Union from carrying on the trade or business, within the United Kingdom, of vendors of gas mantles.

Sched. D, s. 2, of the Income Tax Act, 1853, imposes a duty "For and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident within the United Kingdom, for any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains."

Sect. 41 of the Income Tax Act, 1842, provides that "Any person not resident in Great Britain, whether a subject of her Majesty or not, shall be chargeable in the name of . . . . any factor, agent, or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof."

The Commissioners were of opinion that the assessments were rightly made, and from their determination the present appeal is brought.

The learned counsel took two points on behalf of the appellants: (1.) That the Ramie Union does not trade within the United Kingdom; (2.) that the appellants are not agents within the meaning of s. 41.

In my view this is mainly a question of fact, and the appellant company are not entitled to succeed unless there was no evidence upon which the Commissioners could have come to their determination. If I may be allowed to say so, I find myself in agreement with those learned judges, both in England and in Scotland, who have said that the principles governing the liability to income tax of foreign traders employing agents in this country are perfectly well settled by the numerous cases on this subject.

The leading case is *Grainger & Son* v. *Gough* (1), decided by the

(1) [1896] A. C. 325.

House of Lords. Subsequent cases afford illustrations of the application of those principles to particular facts, and the case before me again presents the familiar problem whether the facts as found come within the principles as laid down.

The leading case concerned the trade of the well-known champagne shipper, Mr. Louis Roederer, of Reims, whose wine was largely consumed in this country. It was pointed out by Lord Herschell that a foreign merchant who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country.

Lord Herschell further laid it down that there was a broad distinction between trading with a country and carrying on a trade within a country. Messrs. Grainger, in that case, had been assessed on the ground that they were agents for Mr. Roederer and that Mr. Roederer carried on a trade in England, but it was held that this was incorrect, because all that they had done was to canvass for orders, to transmit the orders when received to Mr. Roederer at Reims, and in some cases to receive payment on his behalf; and it was decided that Mr. Roederer, although he may have been trading with the United Kingdom, was not trading within it.

A familiar test, which was approved in the leading case, was that laid down by Brett L.J. in the earlier case of *Erichsen* v. *Last* (1), where he says: "I should say that wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad."

Bearing these principles in mind, I turn to the present case. The Ramie Union is a Dutch limited company whose business consists in the manufacture and sale of incandescent gas mantles, having its head office and works at Enschede, in the kingdom of Holland, where all its board meetings are held, its books kept, and banking and general business transacted. The Ramie Union holds no shares

(1) 8 Q. B. D. 414, 418.

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in the appellant company, neither is the appellant company nor any of its shareholders a shareholder in the Ramie Union. The appellant company carries on a large general business as glass importers and hardware merchants, selling to wholesale dealers only. Its transactions with the Ramie Union and in the goods coming from the Ramie Union are only a small part of its total business.

The agreement regulating the rights between the two parties is dated July 13, 1909, made between the Ramie Union of the one part and Weiss & Biheller of the other part, and it was admitted that the appellant company now stands in the shoes of Weiss & Biheller.

The contention of the appellant company is that the effect of that agreement is to constitute an out-and-out sale of gas mantles by the Ramie Union to them, and it is therefore said that the Ramie Union does not carry on a trade within the United Kingdom, or at any rate cannot be made chargeable to income tax because the appellant company are not their agents within the meaning of s. 41.

It is undoubtedly true that if one or two of the clauses are considered alone they might be construed in that way, but in my view for the purpose of considering whether the appellant company are chargeable for income tax it is necessary to look at the whole of the agreement and the circumstances and the method in which the business is carried on.

Under the agreement the union manufacture mantles and add 10 per cent. to the cost. The mantles are then sent by them to England and the appellant company sell them at the best possible price. The profits are divided in this way. The appellant company are entitled to 5 per cent. commission on the turnover for their general expenses and because they are del credere. The Ramie Union are entitled to a sum representing the cost price plus the 10 per cent. The difference between the share of the appellant company and the Ramie Union on the one hand and the amounts received by the sales in England on the other is equally divided between both parties and accounted for half-yearly.

There are subsidiary stipulations under which advances in cost of production are to be adjusted and the appellant company agree to keep a separate day-book showing the selling prices, which is to be open to the authorized directors of the Ramie Union at any time.

Later on a modification of the division of profits was agreed to,

under which the son of the managing director of the Ramie Union obtained 10 per cent., so that the profits were divisible as follows: 10 per cent. to the son, 45 per cent. to the union, and 45 per cent. to the appellant company.

The appellant company are in fact the sole sellers in the United Kingdom of these mantles, and the method of business is that they order from time to time a sufficient quantity to meet orders and as additions to stock. The invoices for the goods sold in England are made out and sent by the appellant company to the customers in England, and the name of the Ramie Union does not appear, although brass plates affixed to the doorways of the appellant company's premises in Chiswell Street bear the name of the appellant company as agents for the Ramie Union, but it was not proved that the authority of the Ramie Union was given for that purpose.

In these circumstances, was there evidence upon which the Commissioners could find that the Ramie Union were carrying on trade within the United Kingdom and that the appellant company were their agents within the meaning of s. 41 ?

I am of opinion there was. The undertakings to sell the goods at the best possible prices and to keep a separate day-book showing those prices which is to be open to the authorized directors of the Ramie Union at any time are consistent with agency. The fact that the appellant company were del credere points to agency and not an out-and-out sale. Further, it was open to the Commissioners to draw the inference, both from the agreement and from the methods of business, that the sales in England were within the words of Brett L.J. in *Erichsen* v. *Last* (1), namely, contracts habitually made in England for foreigners by the appellant company with persons in England. It will be remarked that the circumstances in the present case are widely different from those in *Grainger & Son* v. *Gough*. (2) There no contracts were made in England. Offers were transmitted to France and contracts made there. In the present case contracts were unquestionably made in England. The proceeds from such contracts, after deducting the sums due for expenses to the Ramie Union and the appellant company, were divided between them, and on such a state of facts it was in my view open to the Commissioners to hold that contracts were

(1) 8 Q. B. D. 414, 418. (2) [1896] A. C. 325.

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made in England by the appellant company as agents for and on behalf of the Ramie Union, and that as far as the law of income tax goes this was the real transaction, whatever was the language used by the parties in their agreement.

I was referred to an unreported judgment of the Court of Appeal in *Englebert Tyres, Ld.* v. *Victor Tyre Co.*, where Phillimore L.J. in giving the judgment of the Court refers to the conditions of modern business: he says it is often convenient for a manufacturer or other producer to agree with some other person or company, whom he calls the distributor, that the latter should buy all the producer's goods, or all those to be sold in a particular country or a particular district, and the learned Lord Justice goes on to say, "Such a contract is one of sale and purchase."

In my view those were general remarks made with reference to the contract then before the Court and in no way applicable to the question what would be the position of a foreign company under the Income Tax Acts.

The learned counsel for the appellant company relied upon one sentence in the judgment of Channell J. in *Watson* v. *Sandie and Hull* (1), where he says: "If Mr. Lawrence could have made out that Sandie and Hull purchased from Squire & Co. at a price to be subsequently ascertained by reference to what the goods fetched on the sub-sales, it might have been a question whether there was any trade carried on here by Squire & Co." I should without hesitation follow anything which that learned judge said, but he clearly did not mean to lay down the law in that sentence, nor was it necessary for the decision in the case that he should do so.

For these reasons the appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Clifford, Turner & Hopton.*
Solicitor for respondent: *The Solicitor of Inland Revenue.*

(1) [1898] 1 Q. B. 326, 330.

J. S. H.

EARL OF ELLESMERE *v.* COMMISSIONERS OF INLAND REVENUE.

1918
July 5.

Estate Duty—Estimated Value of Property—"Price which it would fetch if sold in the open market"—Whether Estimate to be made on Assumption that Property sold in Lots—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 7, *sub-s.* 5—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 60, *sub-s.* 2—*Appeal against Assessment to Referee—Jurisdiction of Referee to order partially successful Appellant to pay Costs.*

On the death of the owner of an estate his successor sold it in one lot after it had been well advertised. The estate, which comprised farms, accommodation holdings, private houses, shops and business premises, and a considerable area of woodland, was in several detached blocks lying at a little distance from one another:—

Held, that the fact of the estate consisting of miscellaneous property not all lying together was evidence on which a referee, to whom the value of the estate for the purposes of estate duty was referred, might find that the price which it actually fetched was not the market price within the meaning of s. 7, sub-s. 5, of the Finance Act, 1894, and s. 60, sub-s. 2, of the Finance (1909–10) Act, 1910, but that the true market price was the aggregate of the prices which the several parts would have fetched if the estate had been broken up and sold in suitable lots.

Where a person aggrieved by the decision of Commissioners of Inland Revenue as to the value of property for the purposes of estate duty appeals to a referee under s. 60, sub-s. 3, of the Finance (1909–10) Act, 1910, the appellant is in the position of a plaintiff, and, notwithstanding that he is partially successful in his appeal, the referee has jurisdiction to order him to pay the costs of the appeal.

APPEAL against the decision of a referee assessing the value of property for the purposes of estate duty.

The third Earl of Ellesmere died on July 13, 1914, possessed of an estate in the parishes of Brackley and Eyresham in the county of Northants. The estate, which extended over about 2200 acres, included agricultural holdings, accommodation holdings, private houses, shops and other business premises, and 557 acres of woodland. The greater part of the woodland and some of the agricultural land formed two blocks about three and five miles respectively from the town of Brackley; the remainder of the agricultural land, some of

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the accommodation land, and a small part of the woodland were situate in one block extending from the border of the town of Brackley to about three miles northward. This block was about one and a half miles from the nearest block of woodland and about four and a half from the furthest. The private houses (which included a large residence of great cost), the cottages, shops and business premises, and some of the accommodation land lay in and near the town of Brackley. Shortly after the death of the third Earl his successor, the present appellant, consulted an eminent firm of auctioneers as to the sale of the whole estate, and was advised by them that if he sold it in one lot he would probably obtain a lower price than if he divided it into lots for sale; but, on the other hand, that offering it for sale in lots involved a risk of some of the lots being left unsold for some time, and the appellant accordingly gave instructions to sell the estate in one lot. It was well advertised, and was eventually sold to a land speculator and timber merchant in August, 1915, for 68,000*l.* Shortly afterwards the purchaser resold the farms privately in lots, and later resold the remainder of the estate at or after an auction held about the end of September, 1915, for about 65,000*l.* for the whole estate, excepting four lots, and the timber and the sites of the woods, which were unsold at the date of the appeal to the referee, but it was admitted that the said four lots and the timber were worth upwards of 16,000*l.* On April 30, 1917, the Commissioners of Inland Revenue assessed the principal value of the property for the purposes of estate duty at 77,000*l.* The appellant appealed to a referee under s. 33 and s. 60, sub-s. 3, of the Finance (1909–10) Act, 1910. It was contended on his behalf that he was under no obligation to divide the estate into lots for sale, and that the price that he actually obtained after full advertisement by a sale in one lot was the market price of the estate within the meaning of s. 7, sub-s. 5, of the Finance Act, 1894 (1), and s. 60, sub-s. 2, of the Finance (1909–10) Act, 1910. On the other hand, it was contended by the Commissioners that the true market price of the estate could not be ascertained by a sale in one lot, because it consisted of a miscellaneous collection of property of various descriptions, not all of it even lying together, and was therefore unsaleable in one lot to any one except a speculator buying for division and

(1) These sections are set out in the judgment.

resale at a profit. The referee upheld the contention of the Commissioners that the price actually realized to the appellant was not the true market price, but he was of opinion that 75,618*l.* was the sum which the estate might have been estimated to realize at the time of the death if sold in lots, and he reduced the assessment to that figure accordingly. At the same time he ordered that the costs of the appeal incurred by the Commissioners should be paid by the appellant. From that decision and order the appellant appealed.

Hewitt K.C. and *Allen* for the appellant. It is unreasonable to require a vendor to offer his property for sale in lots if he thinks it is not to his advantage to do so, for he cannot be sure that, if he sells in that manner, he will not be left with the less desirable lots upon his hands, possibly for some years. It is naturally to the interest of the seller to get the best price that he can, and that was what here the appellant was advised by a competent firm of land agents that he would get if he accepted the purchaser's offer. The referee had no jurisdiction to order the appellant to pay costs. No doubt s. 33, sub-s. 3, of the Finance (1909–10) Act, 1910, gives him a discretion over the costs, but he ought to exercise that discretion in a judicial manner in accordance with the practice of the Courts, and according to that practice a successful defendant is never made to pay costs. Here the appellant was in the position of a defendant, for he was resisting the claim of the Commissioners; and he was successful, for the ground of his appeal to the referee was that "the principal value of the said property" as fixed by the Commissioners "is excessive," and that he established; the referee reduced the Commissioners' assessment by a substantial amount.

Sir Gordon Hewart S.-G. and *Sheldon* for the respondents. According to the true construction of s. 7, sub-s. 5, of the Finance Act, 1894, and s. 60, sub-s. 2, of the Finance (1909-10) Act, 1910, the principal value is the best possible price that the property could fetch in the market, and not merely the price which under the particular conditions of the sale it suits the vendor best to accept. If, therefore, a higher price in the aggregate can be obtained by selling in lots he is bound so to sell.

On the question of costs, the referee had complete discretion. With respect to the power of a tribunal to make a successful party

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pay costs, as was said by James L.J. in *Dicks* v. *Yates* (1), "there is an essential difference between a plaintiff and a defendant. A plaintiff may succeed in getting a decree and still have to pay all the costs of the action, but the defendant is dragged into Court and cannot be made liable to pay the whole costs of the action if the plaintiff had no title to bring him there." The appellant when before the referee was in the position of a plaintiff. He was a person "aggrieved by the decision of the Commissioners," and he invoked the assistance of the referee to get that grievance remedied. That being so, it became immaterial that he was to some extent successful. "You may nevertheless make the person who invokes the assistance of the Court pay the costs notwithstanding that he is successful": per Lord Shaw in *Gray* v. *Lord Ashburton* (2), quoting from the judgment of Lord Reading C.J. in the Court below. Further, the appellant was not in fact successful. The question which the parties intended to litigate before the referee was whether the Commissioners were bound by the price which the property actually realized on the sale, and the referee held that they were not.

Hewitt K.C. in reply. This case is distinguishable from *Gray* v. *Lord Ashburton* (2), for there the party who was made to pay the costs of the arbitration was claiming a large sum for dilapidations from an outgoing tenant, and was indisputably a plaintiff; whereas here the appellant did not go voluntarily to arbitration; he could not help himself, for if he had not gone before the referee he would have been bound by the Commissioners' assessment.

SANKEY J. This is a petition by way of appeal by the Earl of Ellesmere against the decision of a referee appointed under the Finance (1909–10) Act, 1910, upon an appeal against the decision of the Commissioners of Inland Revenue determining the principal value of an estate in Northants called the Brackley estate for the purpose of estate duty upon the death of the late Earl. By s. 7, sub-s. 5, of the Finance Act, 1894, "The principal value of any property shall be estimated to be the price which in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased"; and by s. 60, sub-s. 2, of the Finance (1909–10) Act, 1910, "In estimating the

(1) (1881) 18 Ch. D. 76, 85. (2) [1917] A. C. 26, 36.

principal value of any property under s. 7, sub-s. 5, of the principal Act . . . . the Commissioners shall fix the price of the property according to the market price at the time of the death of the deceased, and shall not make any reduction in the estimate on account of the estimate being made on the assumption that the whole property is placed on the market at one and the same time." Upon the death of the late Earl his successor resolved to sell the estate and for that purpose consulted an eminent firm of auctioneers, with the result that he determined to sell it in one lot. It was well advertised, and various offers for its purchase were received. Eventually an offer was made to buy the whole estate for 68,000*l.*, which offer, on the advice of the auctioneers, was accepted. Subsequently the purchaser resold the farms to the tenants, and put up the other portions of the estate for sale by auction in lots. The bulk of the lots was re-sold for about 65,000*l.*, the residue being still in the purchaser's hands at the time of the appeal to the referee. The Commissioners of Inland Revenue fixed the market price of the estate at 77,000*l.*, and the Earl appealed to a referee, contending that the market price was the sum for which it had actually been sold. The Commissioners on the other hand contended that, having regard to the varied character of the property and the fact that it did not all lie together, the price realized by a sale in one lot could not represent the true value. The referee upheld the contention of the Commissioners, though he reduced their figure to 75,618*l.*, and he ordered the appellant to pay the Commissioners' costs of the appeal. From that decision the present appeal is brought. It is said that the referee misdirected himself upon the question of the value, and also that he had no jurisdiction to make a successful appellant pay costs.

Now the Act of 1894 says that the value of the property shall be estimated to be the price which it would fetch if sold in the open market. That, in my opinion, does not necessarily mean the price which it would fetch if sold to a single purchaser. There may be many cases where a sale to a single purchaser cannot realize "the price which it would fetch if sold in the open market." Take the case of an owner having property including a colliery and a draper's shop. It is conceivable that if the colliery and the draper's shop were sold separately the best possible price might be obtained for

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each. On the other hand a purchaser who was anxious to buy the draper's shop might not wish to be encumbered with a colliery, and vice versa, and consequently if the owner insisted upon selling the whole property to one purchaser he would not obtain the market price which the Act contemplates. So, too, with regard to property of the same character situate in different areas. It may well be that if in such case the vendor insists upon the different parts being all sold to the same person he will not get as good a price as if he allowed different persons to buy the portions situate in the different districts. No doubt a sale in one lot of a varied property such as that in the present case may be highly convenient to the vendor. He may want to get the money quickly; he may not care to risk an auction. He may be going abroad, or may be called up to serve in the Army, and it may be of great importance to him to sell at once. But it does not at all follow that the price which he obtains under such circumstances is "the price which it would fetch if sold in the open market." What is meant by those words is the best possible price that is obtainable, and what that is is largely, if not entirely, a question of fact. I can readily conceive cases in which a sale of the whole property in one lot would realize the true market price, but I can equally imagine cases in which it would not. Here the referee held that because the property was of a miscellaneous character and not lying in a ring fence the price paid by the single purchaser was not the true value. I think he was entitled so to hold, and that the contention as to misdirection fails.

I now come to the second ground of the appeal, relating to the question of costs. Sect. 33, sub-s. 3, of the Act of 1910 says that the referee "may, if he thinks fit, order that any expenses . . . . incurred by the Commissioners be paid by the appellant." It clearly gives him a discretion, but it was contended that in awarding costs against the appellant the referee was not exercising that discretion judicially, for, it was said, the appellant was in the position of a defendant before the referee and was successful to a substantial amount, he having secured a reduction of 1382*l.* in the assessment. I think that contention cannot be supported. In my opinion the appellant before the referee was in the position of a plaintiff. The Commissioners had fixed the value at 77,000*l.*, and the onus lay

upon the appellant to show that that figure ought to be reduced. It was for him to begin.

There is, I think, no authority for the proposition that a plaintiff who is to some extent successful may not be made to pay the costs of the defendant. Moreover, here the appellant was unsuccessful upon the real question that the parties went before the referee to fight, the question of principle. No doubt there was a reduction in the assessment to a substantial amount, but that was not the main point of the dispute between them. I think that the referee had a discretion under the circumstances to order the appellant to pay the whole of the costs. I am of opinion that the true rule in such case (and I must not be understood as laying down a rule applicable to other Acts of Parliament in which different words may be used) is that there is jurisdiction in the referee to make the party who invokes the assistance of the Court pay the costs notwithstanding that he is partially successful. I cannot interfere with the referee's exercise of his discretion.

Appeal dismissed.

Solicitors for appellant: *G. H. Barber & Son.*

Solicitor for Commissioners: *Solicitor of Inland Revenue.*

J. F. C.

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June 29;
July 6.

WELD-BLUNDELL *v.* STEPHENS.

[1917 W. 908.]

Action (Cause of)—Libel published by Principal to his Agent—Document mislaid by Agent's Partner—Discovery by Persons libelled—Consequent Recovery of Damages against Principal—Action by Principal against Agent.

The plaintiff employed the defendant, who was a chartered accountant, to investigate the affairs of a company in which the plaintiff had a pecuniary interest, and the defendant accepted the position of the plaintiff's agent for reward in this matter. The plaintiff then wrote and sent to the defendant a letter containing libellous statements referring to the manager of the company and to two other persons. The defendant handed the letter to his partner and asked him to carry out the instructions contained in it. The defendant's partner left the letter on the table of the manager of the company, and thus the two other persons who were libelled in it became aware of its contents and brought libel actions against the plaintiff in respect of the publication of the letter to the chartered accountant employed by the plaintiff. In each case the judge held that the letter was published on a privileged occasion, but the jury found malice and awarded damages against the plaintiff. Thereupon the plaintiff brought the present action against the defendant for breach of an implied term of the contract of employment, alleging that the defendant was bound to keep the letter secret. The jury found that it was the defendant's duty to keep the letter secret, that he had neglected this duty, and that the verdicts for damages for libel were the natural consequence, and they awarded the plaintiff damages :—

Held, that the contract did not by law contain any such implied term as that alleged by the plaintiff and therefore no breach of contract or dereliction of duty was committed by the defendant, and that, whether this was so or not, the plaintiff could not recover damages against another person because he had had to make reparation for a wrongful act committed by himself.

Further Consideration of an action tried before Darling J. and a special jury.

The plaintiff and the defendant had been long acquainted, and had had business relations, which had been for some years intermitted. On March 21, 1915, the plaintiff communicated with the defendant, and in an interview shortly afterwards it was arranged that the defendant, a chartered accountant, should act for the

plaintiff in various matters, particularly in the plaintiff's dealings with the Float Electric Company, in which the plaintiff had considerable pecuniary interest, a company whose affairs and financial position he desired the defendant thoroughly to investigate. The defendant accepted the position of the plaintiff's agent, for reward, in these matters. On May 4, 1915, the plaintiff wrote and sent to the defendant a letter which contained libellous statements referring to a Mr. Lowe, a Mr. Comins, and a Mr. Hirst. This letter the defendant handed to his partner, Mr. Swift, and asked him to carry out the instructions which it contained. Mr. Swift took that letter and other papers to a bank, where he investigated the account of the Float Electric Company in connection with the plaintiff's interest therein. He then went to the offices of the company, and on the table of Mr. Hirst, the manager, he left the libellous letter. Mr. Hirst made known its contents to Mr. Lowe and Mr. Comins, who thereupon sued Mr. Weld-Blundell, and recovered verdicts against him with damages for the publication of the libel to Stephens.

That the letter of May 4 was written and published on a privileged occasion was held by the judges before whom the actions for libel were heard. But the jury in each instance found that the letter was written and published with malice, in the legal sense. Thereupon Mr. Weld-Blundell brought this action against the defendant for breach of an implied term of the contract of employment, alleging that his agent was bound to keep secret all such communications and instructions and not to disclose them or permit them to be disclosed or published to others.

The questions left to the jury, and their answers, were these :—

(1.) Was it the duty of the defendant to keep secret the letter of May 4 written by the plaintiff to the defendant ?—Yes.

(2.) Did the defendant neglect his duty in regard to the said letter so that the contents thereof were disclosed or came to the knowledge of Mr. Hirst ?—Yes.

(3.) Were the actions for libel brought by Lowe and Comins against the plaintiff, and the damages recovered by them, the natural consequence of the proved negligence of the defendant ?—Yes.

The jury awarded the plaintiff 650*l.* damages.

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Douglas Hogg K.C. (*Patrick Hastings* with him) for the defendant. The defendant is entitled to judgment non obstante veredicto. Compensation cannot be recovered for loss which a person has suffered by reason of his own unlawful act. That principle is of universal application, except possibly where the person seeking compensation was misled into doing the unlawful act by the person from whom he seeks compensation. But that exception has no application to the present case. As malice was found in the libel actions, the plaintiff was committing a criminal offence as well as a civil wrong when he wrote and published the libel to the defendant. The offence and the wrong were complete when the defendant received the communication. It was the publication to the defendant in respect of which Lowe and Comins recovered damages, not the publication to Hirst. The plaintiff is really claiming compensation because the defendant through his partner allowed Lowe and Comins to discover that they had been wronged by the plaintiff. But there could be no duty on the defendant not to disclose the fact that the plaintiff had committed a crime. In *Colburn* v. *Patmore* (1) Lord Lyndhurst C.B. said that he entertained little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission. A promise to indemnify a man against all the consequences of an offence cannot be supported on any principle of law: per Tindal C.J. in *Shackell* v. *Rosier*. (2) If an act is manifestly unlawful, or the doer of it knows it to be unlawful, as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom: per Kennedy J. in *Burrows* v. *Rhodes*. (3) In *Leslie* v. *Reliable, &c., Agency* (4) Rowlatt J. held that the plaintiffs, who were money-lenders and had employed the defendants to send out circulars, were not entitled to be indemnified by the defendants in respect of a fine and costs imposed on the plaintiffs by reason of the fact that the defendants had negligently sent a circular to a minor.

J. B. Matthews K.C. (*Maddocks* with him) for the plaintiff. It

(1) (1834) 1 C. M. & R. 73. 646.
(2) (1836) 2 Bing. N. C. 634, (3) [1899] 1 Q. B. 816, 828.
(4) [1915] 1 K. B. 652.

does not necessarily follow that the plaintiff committed a criminal offence in publishing the libel to the defendant. There is no criminal offence unless the libel is calculated to provoke a breach of the peace. No doubt in ordinary cases a libel would usually be calculated to do so, but where the libel is a letter written by a man to his confidential agent, though it would be open to the jury to find that it was calculated to provoke a breach of the peace, yet they need not so find, and in the absence of such a finding by the jury there would be no criminal offence. Even if the plaintiff did commit a criminal offence, it is a fallacy to say that a person can never recover damages because he has been proved to have committed a crime. In *Cointat* v. *Myham & Son* (1) Lord Coleridge J. held that a butcher who had bought meat from the defendants in reliance on their skill and judgment and without knowing that the meat was bad could recover from the defendants damages in respect of a fine and costs imposed on him for having bad meat on his premises. The possibility of protecting one's self from the consequences of a criminal prosecution by taking a guarantee was suggested by Pollock C.B. in *Reg.* v. *Woodrow* (2), where he said that a dealer in tobacco might, on making a purchase, take a guarantee from the vendor which would render the latter responsible in the event of the purchaser being fined for having in his possession adulterated tobacco. *Saunders* v. *Seyd and Kelly's Credit Index Co.* (3) shows that a person can make a valid contract that he will not disclose a libel published to him. *Leslie* v. *Reliable, &c., Agency* (4) is not in point. The plaintiffs in that case were convicted because they could not have expected the work to be properly done by the defendants for such a miserable remuneration. *Colburn* v. *Patmore* (5) only applies where both the plaintiff and the defendant have been jointly concerned in the commission of the tort. There was a duty on the defendant not to disclose the libel.

Hogg K.C. replied.

Cur. adv. vult.

July 6. DARLING J. read the following judgment:—This case raises a new question and one which I find it difficult confidently to

(1) [1913] 2 K. B. 220.
(2) (1846) 15 M. & W. 404, 416.
(3) (1896) 75 L. T. 193.
(4) [1915] 1 K. B. 652.
(5) 1 C. M. & R. 73.

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decide. [His Lordship then stated the facts and the findings of the jury as above set out.]

Notwithstanding these findings, it is contended on behalf of the defendant that the plaintiff cannot have judgment, on the ground that injury sustained by the defendant is traceable to his own unlawful act, and the maxim "Ex turpi causa non oritur actio" is said to apply. So far as I am aware, there is no decision of a Court of law which covers this case. Many authorities were cited to me in argument, but not one of them seems to me to be directly in point. The difficulty which I most feel is how to decide whether the claim in this action can properly be held to arise ex turpi causa.

In *Merryweather* v. *Nixan* (1) it is decided that one tortfeasor cannot recover contribution against another, and this is no more than an instance of the general rule or maxim already quoted, but there are modifications of it, as appears by the cases of *Campbell* v. *Campbell* (2) and *Burrows* v. *Rhodes*. (3)

The tort which plaintiff committed and suffered for was the writing and publishing, with legal malice, of a libel which, but for proof of his malice, would have been protected by the privilege of the occasion. The defendant Stephens had no part in the composing of the libel, nor was he actuated by malice in the receiving of it, nor in such publication as he made of it when his partner negligently, but inadvertently, left it on Mr. Hirst's table. Indeed, in the publication, which formed a portion of the tort for which Mr. Weld-Blundell was held liable, the defendant Stephens had no part or liability whatever, for the publication of which Lowe and Comins complained was that to the defendant Stephens himself. I cannot therefore regard defendant as a joint tortfeasor with plaintiff, since in that matter he committed no tort whatever. If defendant committed any tort, or any jointly with plaintiff, it was when his partner negligently left the libel on the table of Mr. Hirst, and so published it to him. But that publication was not malicious nor even intentional; nor was it the foundation of the actions by Lowe and Comins, for these proceeded on the publication by Weld-Blundell to Stephens himself.

Out of what cause, then, does this present action arise? Are we

(1) (1799) 8 T. R. 186. (2) (1840) 7 Cl. & F. 166.
(3) [1899] 1 Q. B. 816.

to forget in considering turpes causas that non causa remota, sed proxima spectatur, and is not the real cause in this action, the causa proxima merely—defendant's carelessness in his custody of a document confided to him for his information and direction in the duty he had undertaken? Were it to be held, however, that the cause of action in this case arose directly out of the writing of the libel by plaintiff and the publication of it by him to defendant, it would appear to be somewhat uncertain, having regard to the case of *Saunders* v. *Seyd and Kelly's Credit Index Co.* (1), whether even then this action might not be maintained.

The authority on which defendant relies is *Colburn* v. *Patmore* (2), and although the judgments therein are, so far as they touch this case, obiter dicta, I accept them without hesitation as expressing the law, but they have no direct application to the present case. It does not help defendant to cite Lord Lyndhurst where he says, "I entertain little doubt that a person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission"; for, even had the writing and publishing of the libel on Lowe and Comins amounted to a criminal offence, the defendant Stephens had no hand in the writing of it, nor in that publication which, as I have said, was the publication by plaintiff himself to defendant Stephens himself. In that publication defendant Stephens can hardly be called one who "had participated in its commission."

The plaintiff, for his part, relies on the form of the judgments in *Saunders* v. *Seyd and Kelly's Credit Index Co.* (1) These undoubtedly indicate that there may be a binding contract by which a person agrees not to disclose a libellous document confided to him. Lindley L.J. says "Mr. Chapman owed a duty to his client," and the duty, if any, would be to preserve secrecy regarding libellous matter communicated to him. But Rigby L.J. says: "It does not follow that, because a man is the solicitor of another and has documents put into his hands, he is bound by some hard and fast rule not to disclose what he sees in them. There might be a gross and malicious libel, and I will not say without fuller consideration that the solicitor is not bound to disclose it. That question is not involved in this appeal." Perhaps Rigby L.J. is not rightly

(1) 75 L. T. 193, 194, 195. (2) 1 C. M. & R. 73, 83.

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reported as saying "bound to disclose it." It would seem probable that he was in doubt as to whether the solicitor was by virtue of his retainer bound not to disclose the libel written by his client and published on a privileged occasion. It must often happen that the claim of a litigant cannot be formulated without making such charges against his opponent as must amount to actionable libels, and I cannot imagine that Rigby L.J. intended to intimate that it might then be the duty of a solicitor to betray his client into the hands of his enemies.

After much consideration I have, however, come to the conclusion that our law does not, and cannot, imply any such promise or term as that which plaintiff alleges, and that therefore no breach of contract or dereliction of duty was committed by the defendant.

But were this otherwise, there would remain the question whether plaintiff could recover against defendant damages consequent on the actions for libel brought by Lowe and Comins against the plaintiff. These causes of action existed before defendant by disclosing the existence of the libel had enabled Lowe and Comins to sue. The jury have found that the bringing of those actions and the resulting loss to plaintiff are the natural consequence of defendant's negligent disclosure, and I agree with them, for Mr. Swift himself realized at once what might happen; and his forebodings were amply and instantly justified. Still plaintiff would have taken no harm had he not himself been guilty of the wrong which defendant merely revealed. The question to be decided may, I think, fairly be put in these words, "Can one recover damages against another because he has had to make reparation for a wrongful act committed by himself?" I think he cannot. Should it appear hard that a man may not write frankly to his confidential agent, or solicitor, when to expound his own case may necessitate publishing a libel on another, I think the answer is that he is protected by the occasion, unless he abuses his privilege and loses it by his malice—a wrong to his neighbour against the consequences of which no law should allow him to protect himself by any contract, either express or implied. The Roman law boldly declared "pacta quae turpem causam continent non sunt observanda." As for the agent, or solicitor, who had disclosed the document, he might or might not be made amenable to

the person libelled according as he had or had not made the disclosure on a privileged occasion, and without malice on his part.

And so I give judgment for defendant.

Judgment for defendant.

Solicitors for plaintiff: *Blanckensee & Co.*

Solicitors for defendant: *Spyer & Sons.*

J. S. H.

WILLIAMS *v.* SINGER AND OTHERS.

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July 1, 8.

Revenue—Foreign Possessions—Dividends not remitted here—British Trustees of Foreign Beneficiary—Liability of, to Income Tax—Finance Act, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 5.

Where trustees hold shares in a foreign company on behalf of a foreign subject domiciled abroad, the fact that they themselves are domiciled and resident in the United Kingdom does not make them chargeable with income tax in respect of dividends on those shares not remitted to this country but paid direct to the beneficiary abroad.

CASE stated under s. 59 of the Taxes Management Act.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on February 1, 1918, Washington M. G. Singer, Sir G. A. Touche, and J. Ferguson (hereinafter called the respondents) appealed against an assessment of 60,000*l.* in respect of foreign possessions and an assessment of 5000*l.* in respect of foreign securities for the year ended April 5, 1916, made upon them by additional Commissioners for the division of New Sarum in the county of Wiltshire, under 16 & 17 Vict. c. 34, s. 2, Sched. D.

The greater part of the income in respect of which the assessments are made is derived from shares in a company, incorporated under American law, called the Singer Manufacturing Company of New Jersey, and the decision in respect of such income is to govern the liability of the respondents in respect of all other income from foreign securities and possessions not remitted to the United Kingdom which they hold on the same title as the said shares. The said shares are now vested in the respondents as trustees under certain deeds

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whereby they hold the same in trust for Winnaretta Eugenie Princess de Polignac. By the terms of the said deeds the Princess is entitled to the whole of the income for her life, and is entitled to dispose of the property by will or codicil. The respondents have at all times been domiciled and resident in the United Kingdom. They are registered in the books of the Singer Manufacturing Company of New Jersey as the owners of the shares.

The respondents have given a mandate and instructions to the Bank of British North America, New York, to collect and receive the dividends of the said shares and to credit them to the account of the Princess de Polignac at the said bank in New York. No part of the dividends has at any relevant time been remitted to or received in the United Kingdom.

The Princess de Polignac did not during the year of assessment possess any place of residence in the United Kingdom, nor was she ever during such year in the United Kingdom. She is a French subject and is not domiciled in the United Kingdom, nor was she resident therein at any relevant time.

By s. 100, Sched. D, cases 4 and 5, of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), income from foreign securities and foreign possessions was made liable to income tax only in so far as it was received in the United Kingdom; but by s. 5 of the Finance Act, 1914, "Income tax in respect of income arising from securities, stocks, shares, or rents in any place out of the United Kingdom shall, notwithstanding anything in the rules under the fourth and fifth case in s. 100 of the Income Tax Act, 1842, be computed on the full amount of the income, whether the income has been or will be received in the United Kingdom or not, subject in the case of income not received in the United Kingdom to the same deductions and allowances as if it had been so received, and to the deduction (where such a deduction cannot be made under any other provision of the Income Tax Acts) of any sum which shall have been paid in respect of income tax in the place where the income shall have arisen, and to a deduction on account of any annual interest or any annuity or other annual payment payable out of the income to a person not resident in the United Kingdom . . . .

"Provided that this section shall not apply in the case of a person who satisfies the Commissioners of Inland Revenue that he is not

domiciled in the United Kingdom, or that, being a British subject, he is not ordinarily resident in the United Kingdom."

The Commissioners held that the liability to income tax of the respondents, being trustees, was neither greater nor less than the liability of the Princess would be if she were resident in the United Kingdom, and they accordingly discharged the assessments. The surveyor of taxes appealed.

Sir Gordon Hewart S.-G. and *T. H. Parr* for the appellant. The question arising on this appeal is whether liability to income tax on the profits of shares in a foreign company held under a British trust by trustees resident in the United Kingdom is to be determined by reference to the residence of the trustees or to that of the beneficiary. The charging section which imposes the liability to the tax in respect of this class of property is s. 100 of the Income Tax Act, 1842, which provides that the duties under Sched. D "shall be charged annually on and paid by the persons . . . . receiving or entitled unto the same." Under case 5 of that schedule the duty to be charged in respect of "foreign possessions," which term included shares in a foreign company, was to be computed on the actual sums annually received in Great Britain. But the law in that respect was altered by s. 5 of the Finance Act, 1914, which provides that income tax in respect of income arising from shares in any foreign country shall be computed "on the full amount of the income whether the income has been or will be received in the United Kingdom or not. . . . . Provided that this section shall not apply in the case of a person who . . . . is not domiciled in the United Kingdom." The question is whether the fact of the Princess de Polignac, the beneficiary in this case, not being domiciled here entitles her to the benefit of that proviso. The "person" there referred to is the person assessable, and the person assessable is by virtue of s. 100 of the Act of 1842 the person "receiving or entitled to" the income in question. Where property is held in trust the person receiving and entitled to the income is the trustee and not the beneficiary. It is with the owner of the trust fund that the Income Tax Acts are concerned, and that is the trustee. That this is so appears clear from a consideration of s. 71, sub-s. 2, of the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), and s. 13 of the Revenue Act,

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1911 (1 Geo. 5, c. 2). By the former of those two sections, "Income tax shall not be payable in respect of the interest or dividends of any securities of a foreign State . . . . where . . . . the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom." By the latter, "Where the securities of a foreign State . . . . are held under any trust and the person who is the beneficiary in possession under the trust is the sole beneficiary in possession and can, by means either of the revocation of the trust or of the exercise of any powers under the trust, call upon the trustees at any time to transfer the securities to him absolutely free from any trust, that person shall be deemed to be the person owning the securities for the purposes of sub-s. 2 of s. 71 of the principal Act." That shows plainly that prima facie the beneficiary under a trust is not the person owning the securities and entitled to the dividends. The proposition that for income tax purposes the owner who is to be assessed is the trustee is illustrated by the case of *Fry* v. *Shiel's Trustees* (1), where it was held that beneficiaries, who were minors, were not entitled to the relief afforded to earned income under s. 19 of the Finance Act, 1907, the income in question being derived from a business carried on for their benefit by the trustees, because in law the business was the property of the trustees and not of the beneficiaries. The language of the charging section, in imposing the tax on all "persons receiving or entitled to" the income, is perfectly general. The word "person" includes everybody who is in a position to receive and control his property, even persons under a legal incapacity, such as infants or (to a limited extent) persons of unsound mind. In *Rex* v. *Newmarket Income Tax Commissioners* (2) it was held that an infant who carried on the business of a jockey and earned large profits was a "person" assessable to income tax, notwithstanding s. 41 of the Income Tax Act, 1842, which provides for the trustee of an infant being chargeable. In that case the infant had no trustee. His profits were received directly by himself. If he had had a trustee the trustee would have been assessable and he would not. Again, the word "receiving" is equally general. Provided the receipt is by a person resident in this country it is immaterial where the receipt is. Here the trustees received the dividends in New York; the obedience of the New York bank to their mandate

(1) (1914) 6 Tax Cas. 583. (2) [1916] 1 K. B. 788.

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in collecting the dividends and paying them to the beneficiary was a receipt by the trustees none the less because the trustees were resident in the United Kingdom and the dividends were not remitted here. It is true that s. 41 of the Act of 1842 provides that "any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of such trustee," which at first sight looks as though a beneficiary under a trust was prima facie assessable, and in a case coming within the section was only chargeable in the name of the trustee because he was non-resident. But the explanation is that there are two classes of trustees, those in whom the legal interest in the trust funds is vested, and those in whom it is not; and it is to the latter class of trustees alone that the section in using that term is referring. This is to be inferred from the fact that the word "trustee" is there coupled with "any factor agent or receiver having the receipt of any profits or gains," a class of persons in whom it is clear the legal estate is not vested. The truth is that s. 41 has nothing to do with the person who is assessable; it is mere machinery. As was said by Mathew J. in *Tischler* v. *Apthorpe* (1), "Section 41 is intended to aid the Commissioners in recovering the tax, and not to alter the incidence of taxation in any way." And in *Werle & Co.* v. *Colquhoun* (2), where a French firm of wine merchants exercised a trade here through agents, it was held that they were assessable notwithstanding s. 41, Lord Esher M.R. saying: "I do not think that the right to assess is limited by s. 41, which is only machinery." In such a case either the foreign principal, if he can be got at, or the British agent may be assessed. The present case is not concerned with that section.

Disturnal K.C. and *Latter* for the respondents. Where shares are held in trust the person entitled to the dividends and receiving them is the beneficiary, and as such is assessable to income tax, though in certain cases, as for instance where he resides abroad, he has to be assessed in the name of the trustee. In such cases the trustee is assessed, not because he is the owner, but to enable the Crown to reach the person who is really liable. Before the Act of 1914 no one could have been assessed in respect of the property in the

(1) (1885) 2 Tax Cas. 89, 93. (2) (1888) 20 Q. B. D. 753, 760.

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present case. That Act in doing away with the necessity of the receipt of the income in this country was not intended to alter the incidence of the charge, but only to widen the subject-matter on which the tax was charged. It enlarged the class of property to be brought into account, not the class of persons to be chargeable. If the Solicitor-General's contention is right that the trustee is the person to be assessed in all cases where property is held in trust, then if the position of the parties were reversed and the trustees were foreigners resident abroad while the beneficiary was a British subject resident here, he would be driven to admit that the income could not be assessed. It is a common practice for banks to collect dividends on foreign securities for distribution, the securities standing in their names, and they being registered as holders. If the Crown's contention is right the banks would be assessable in respect of the portion of the dividends belonging to residents abroad; but they have in practice never been so assessed. It is conceded that s. 41 of the Act of 1842 is pure machinery; it is only required to be resorted to where for some reason the person entitled to the income cannot be got at, as for instance where he is resident abroad. In such case the person so entitled is to be charged in the name of the trustee having the receipt of the profits, but only "in the like manner and to the like amount as would be charged if such person were resident in Great Britain," and here the beneficiary, even if she were resident in Great Britain, would not be liable to be charged. Suppose in this case, instead of the three trustees being all English, two of them were French resident in France, and suppose they insisted on the dividends being paid direct to the beneficiary abroad, it would be most unjust to charge the English trustee with income tax, for he would have no means of indemnifying himself.

T. H. Parr replied.

Cur. adv. vult.

July 8. SANKEY J. read the following judgment:—This is a case stated under s. 59 of the Taxes Management Act by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of this Court, and raises the question whether certain gentlemen who reside in England, and who are the trustees of a French subject who is not domiciled in the United Kingdom, can be made

liable to English income tax in respect of dividends on shares of an American company, which dividends are never remitted to the trustees in England, but are sent direct from America to the French subject.

The facts are as follows: The income in question is derived from shares in a company incorporated under American law called the Singer Manufacturing Company of New York. The respondents are trustees of the Princess de Polignac. They are registered in the books of the Singer Company as, and they are in law, the owners of the shares. They gave instructions to the Bank of British North America, in New York, to collect and receive the dividends on the shares and to credit them to the account of the Princess at the said bank in New York. No part of the dividends has at any time been remitted to or received in the United Kingdom. The Princess did not during the year of assessment possess any place of residence in the United Kingdom, nor was she during such year in the United Kingdom. She is a French subject and is not domiciled in the United Kingdom. The surveyor of taxes contended that the respondents being legal owners of the shares and entitled to receive the profits and gains arising or accruing therefrom, and being domiciled and resident in the United Kingdom, are assessable to income tax in respect of such profits and gains under the provisions of s. 5 of the Finance Act, 1914. The Commissioners decided against the contention of the surveyor and the Crown appeals from that decision. The Solicitor-General, who appeared for the appellant, stated the point at issue very concisely when he said that the question is whether the liability for tax on investments held by British trustees resident in the United Kingdom on behalf of a non-resident cestui que trust where the proceeds are never remitted to the United Kingdom is to be determined by the domicil of the trustees or by that of the cestui que trust. A very large number of sections in a very large number of taxing Acts and a great number of cases were referred to, and I must be allowed to confess that I appreciate the position of those persons who "found no end in wandering mazes lost." I will, however, endeavour to state as clearly as I can the principles which appear to me to apply to the present circumstances. The Income Tax Acts of 1842 and 1853 are, amongst a number of other matters, directed to two main points: (1.) the class of persons

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Sankey J.

to be taxed; (2.) the class of property to be taxed. These classes being defined, there are innumerable machinery sections which regulate the working out of the assessments. The Solicitor-General drew my attention to the charging sections, and, referring to the case of *Rex* v. *Newmarket Income Tax Commissioners* (1), argued that these sections are extremely wide and cover the case of trustees like the present who are the legal owners of the property and are domiciled in England. The learned counsel for the respondents on the other hand contended that persons in the position of the present trustees had never been assessed in like circumstances and that nobody would have thought of assessing them before s. 5 of the Act of 1914 was passed, that liability was sought to be established under that section, and it was only under that section that liability would exist, but that when properly considered the section did not apply. In my view it is important to bear in mind the difference between the class of persons who are assessable and the class of income which is assessable. The charging section is s. 100 of the Act of 1842, and by its fourth and fifth cases provides (in respect of Sched. D) for the computation of duty from foreign securities and foreign possessions, and Sched. D in the 1853 Act provides for duties "for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains." It will be observed that the schedule contemplates (1.) the payment of income tax by persons, whether subjects of His Majesty or not, although not resident in the United Kingdom, and (2.) the payment of the tax in respect of sums received from foreign securities or possessions remitted to this country. Sect. 41 of the 1842 Act, which is a machinery section, provides that non-residents are to be charged in the name of their trustee or agent. It seems that non-residents could only be made amenable to the English income tax if they could be brought within the ambit of those sections, and in my opinion, up to 1914, before a non-resident in the position of the Princess in this case could be

(1) [1916] 1 K. B. 788.

made liable (1.) he must have had a trustee in England, and (2.) the sums received from the securities or possessions must have been remitted to England, in which event the trustee would have been assessed and liability really imposed through him. It was then urged by the Crown that s. 5 of the Finance Act, 1914, had altered this position by providing in effect that dividends earned abroad were liable to the English income tax whether they were remitted to England or not, and it was contended that the present trustees had been rightly assessed. The distinction, however, between the class of persons assessable and the class of property assessable must still be borne in mind, and I am of opinion that s. 5 enlarges the class of property but does not enlarge the class of persons liable. It will be observed that the section itself starts by saying that income tax in respect of income arising in any place out of the United Kingdom shall, notwithstanding anything in the rules under the fourth and fifth cases in s. 100 of the Income Tax Act, 1842, be computed on the full amount of the income whether the income has been received in the United Kingdom or not. The fourth and fifth cases refer to property to be charged, as distinguished from persons to be charged, and in like manner I think s. 5 refers to property and not to persons. Although it is true to say that persons are charged to the income tax, it is equally true to say that they are charged because they have property. It is the profits which have to pay : see per Lord Salvesen in *Crookston Brothers* v. *Furtado* (1), where, referring to s. 41 of the Act of 1842, he says : " The intention of the statute is not to make the agent personally liable for the income tax due by the foreign firm, but only to make him so liable when he has the opportunity of recouping himself out of moneys belonging to the foreign firm." In my opinion it is not possible to make a trustee liable for income tax to be paid out of moneys of the cestui que trust when the cestui que trust is himself not liable. The machinery of s. 41 is machinery by which, through a trustee, a person who is liable for income tax can be reached. The residence of a trustee is not visited upon the cestui que trust so as to make the latter liable for income tax when he would not otherwise be so liable. In my opinion trustees in the position of the present ones were neither before nor have they been

(1) (1910) 5 Tax Cas. 602, 626.

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since the Act of 1914 liable to pay income tax under such circumstances. In the result the Commissioners were right and this appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Charles Russell & Co.*

J. F. C.

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[IN THE COURT OF APPEAL.]

MINISTER OF MUNITIONS *v.* CHAMBERLAYNE.

Defence of the Realm—Acquisition of Land compulsorily—Factory "erected" in Park before passing of Act—Acquisition of Park and Mansion-house—Defence of the Realm (Acquisition of Land) Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 63), *ss.* 3, 12, 13.

By the Defence of the Realm (Acquisition of Land), Act, 1916, s. 3, sub-s. 1, "Subject to the provisions of this Act it shall be lawful to acquire by agreement or compulsorily on behalf of His Majesty—(*a*) any land in the possession of an occupying department or any interest in such land; (*b*) any land on over or under which any buildings . . . . have, for purposes connected with the present war, been erected, constructed, or made wholly or partly at the expense of the State, or any interest in such land." By s. 12, sub-s. 1, for the purposes of the Act, and of the provisions of the Lands Clauses Acts incorporated with the Act, "land" includes "any building or part of a building." By s. 13, sub-s. 1, "Nothing in this Act shall authorise the acquisition . . . . otherwise than by agreement of any land which forms part of any park, garden, or pleasure ground, or of the home farm attached to and usually occupied with the mansion house . . . . Provided that . . . . (*b*) where before the passing of this Act there have been erected on any park, garden, pleasure ground, or farm as above mentioned, any buildings for the manufacture of munitions of war, the [Railway and Canal] Commission may by order authorise the compulsory acquisition of the park, garden, pleasure ground, or farm, or any part thereof, where they are satisfied that it is of national importance that it should be acquired, so, however, that if the owner so requires the whole of such property, including the mansion house, if any, shall be acquired":—

Held, that the expression "any land in the possession of an occupying department" in clause (*a*) of sub-s. 1 of s. 3, notwithstanding the restriction imposed by s. 13, sub-s. 1, extended to and

included not only any land, but any buildings upon the land, whether mansion-house, cottage, stables, or other buildings.

Held, therefore, that there was power under s. 3, sub-s. 1, to acquire the mansion-house as part of the park, and that the words "including the mansion-house, if any," in s. 13, sub-s. 1, were inserted ex abundanti cautela by way of protection to the owner.

Held, also, that the power given by the statute to acquire compulsorily was not limited to such portion of the park as was in the actual occupation of an occupying department with a reasonable or sufficient curtilage, but extended to the whole of the park if the Railway and Canal Commissioners were satisfied that it was of national importance that the whole should be acquired.

APPEAL from an order of the Railway and Canal Commissioners (Lush J., Hon. A. E. Gathorne-Hardy, and Lord Terrington).

The application was made by the Minister of Munitions under s. 13, sub-s. 1 (*b*), of the Defence of the Realm (Acquisition of Land) Act, 1916, for an order authorizing him to acquire compulsorily a large part of the respondent's park and the mansion-house.

Before December 22, 1916, the date of the passing of the above-mentioned Act, the Minister of Munitions had erected a large munitions factory on land belonging to a railway company which was contiguous to the respondent's park. As it was found necessary to enlarge the factory, the Minister of Munitions had commenced to build an extension on that part of the respondent's park adjacent to the railway company's land. This new part of the factory had not been completed when the Act was passed, but a number of stanchions had been put up, cross-pieces for the roof had been constructed, and most of the roof had been put on, but the walls were not up or were not finished, and a good deal remained to be done before the new building could be used for the purpose in question.

A new road had been made along the western side of the park to give more convenient and better access to the new part of the factory, the only existing access being by means of an old road which had been stopped during the war and was unsafe to use.

At the further extremity of the park, at some distance from the new part of the factory, there was an excellent water supply, which the Minister of Munitions had utilized for the purposes of the factory, for which a large daily supply of water was required.

The mansion-house had been occupied by the Minister of

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Munitions for the accommodation of the staff superintending the work carried on in the factory, and it had been altered to suit their requirements.

The order asked for was to authorize the Minister of Munitions to acquire, not only the site of the new part of the factory and the factory itself, but also a large part of the park and the mansion-house.

The respondent contended that the Court had no jurisdiction to make the order asked for, and that even if the Court had jurisdiction it ought not to make the order. The respondent had served notice under the proviso in s. 13, sub-s. 1 (*b*), of the Act on the Minister of Munitions requiring him, in the event of the Court making the order, to take the whole of the park.

The application was heard before the Commissioners on February 19 and 20 and on March 25, 1918, they made the order asked for.

Lush J. in his written judgment said that it had been contended that before the Court could make the order asked for it must be shown that, at the time the Act was passed, a factory or part of the factory had been completely erected on the respondent's park. In his opinion, a building had been "erected" on the park at the time the Act was passed, although it was not yet capable of being used as a factory. There must have been a substantial structure on the land. The question was one of fact which they must look at reasonably. It was next said for the respondent that the Act only enabled the Court to authorize the acquisition of the site of the building. The Act was too plain to make that contention possible; it clearly enabled the Court to authorize the whole or any part of the park to be taken. Next, it was contended that the Court could not authorize the acquisition of the mansion-house, but only the actual park. Colour was no doubt given to this contention by the addition of the words "including the mansion-house" in proviso (*b*) to sub-s. 1 of s. 13; but the contention, in his opinion, was not well founded. If the Minister of Munitions could not acquire buildings compulsorily he might be left with buildings in other hands, not under his control, in the centre of a property which necessity might require should be under his exclusive observation and control. The Court had power to include buildings in the order. He was also

satisfied on the evidence that the acquisition of the park, the road, the water supply, and the mansion-house was of national importance, and the order asked for would be made.

Hon. A. E. Gathorne-Hardy and Lord Terrington read judgments to the same effect.

The draft order, which was dated May 9, 1918, after reciting (inter alia) that the buildings were erected before December 22, 1916, partly on the land edged yellow and partly on the land edged pink on the plan annexed to the order, and that it was of national importance that the said land edged pink should be acquired on behalf of His Majesty, proceeded: "This Court doth find and determine that there had been erected on the said land described in the said schedule and edged pink as aforesaid before the passing of the Defence of the Realm (Acquisition of Land) Act, 1916, buildings for the manufacture of munitions of war and this Court being satisfied that it is of national importance that the said land described in the said schedule and edged pink as aforesaid including the said mansion-house situated therein should be acquired on behalf of His Majesty doth hereby authorize the compulsory acquisition by the applicant of the said land described in the said schedule and edged pink as aforesaid including the said mansion-house situated therein . . . ."

The respondent appealed. The appeal was heard on July 15, 1918.

The substantial question argued on the appeal was whether the mansion-house could be acquired compulsorily. The arguments on this point are fully stated in the judgments.

Sir Ernest Pollock K.C., *Courthope-Munroe K.C.*, and *G. J. Salmon* for the appellant.

Sir Gordon Hewart S.-G., *Honoratus Lloyd*, and *Branson* for the Minister of Munitions.

SWINFEN EADY M.R. This is an appeal from the order of the Railway and Canal Commission, the draft of which is dated May 9, 1918. It is an order which authorizes the acquisition by a Government department of the whole of the land described in a notice to treat, and comprised in the application to the Commission. The

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land is described in a schedule to those documents as being numbered upon a plan 1, 1A, 1B, comprising altogether 76 acres 3 roods, and in respect of which possession was taken by the Government department on the dates therein mentioned, that is to say, with regard to the great bulk of the property numbered 1, the 62 acres odd, on April 19, 1916, the property numbered 1A, extending to about 4½ acres, on May 12, 1916, and the property numbered 1B, between 9 and 10 acres, on June 23, 1916. The appellant is the owner of the property, and he raises by his appeal these two points: He contends, first, that the Government department had no authority under the statute to take compulsorily the mansion-house, situate in the park, and, secondly, that the part which alone should have been sanctioned should have been such part of the park as was in the occupation of the Government department, with a reasonable or sufficient curtilage for the convenient occupation of that part, including the road and the site of the road, which is a new access that has been made to the premises. Both points depend upon the true construction of the statute which was passed on December 22, 1916, and is intituled the Defence of the Realm (Acquisition of Land) Act, 1916. Sect. 3 of the statute, which provides for certain land being acquired permanently, by sub-s. 1 enacts: "Subject to the provisions of this Act it shall be lawful to acquire by agreement or compulsorily on behalf of His Majesty—(*a*) any land in the possession of an occupying department or any interest in such land . . . ." The whole of the land with which we are dealing, and which is comprised in the notice to treat, was in the possession of an occupying department at the date of the passing of the statute. It is said that "land" there does not extend to and include the mansion-house. By s. 12 the word "land" is thus interpreted: "For the purposes of this Act, and of the provisions of the Lands Clauses Acts incorporated with this Act, land includes any building or part of a building . . . . and any easement or right over or in relation to land." It therefore includes any building or part of a building.

In my opinion the expression "any land in the possession of an occupying department" in clause (*a*) of sub-s. 1 of s. 3 extends to and includes not only any land, but any buildings upon the land, whether they are a mansion-house or cottage or stables or other

buildings. If that is so and that were all, then there would be power to acquire compulsorily on behalf of His Majesty all the land in question, all the land comprised in the notice to treat, with the buildings upon it. But the power to take compulsorily is restricted by s. 13, sub-s. 1, which provides: "Nothing in this Act shall authorise . . . . the acquisition otherwise than by agreement of any land which forms part of any park, garden, or pleasure ground, or of the home farm attached to and usually occupied with the mansion-house, ... or of any interest in such land or grounds." Those words which I have just read in sub-s. 1 have to be interpreted, and in my opinion, where reference is there made to the "acquisition otherwise than by agreement of any land which forms part of any park, garden, or pleasure ground, or of the home farm," the word "land" is used in the same sense and meaning as it was used previously, and it includes land with the buildings upon it, though it forms part of any park, garden, pleasure ground, or home farm. Then comes the proviso, "Provided that—(*a*) nothing in this sub-section shall prevent the acquisition, whether by agreement or compulsorily, of a right to use and maintain any cables, lines, or pipes which have been laid under any such land as aforesaid." No question arises here with regard to that clause; the contest has turned on the next clause, "(*b*) where before the passing of this Act there have been erected on any park, garden, pleasure ground, or farm as above mentioned, any building for the manufacture of munitions of war, the Commission may by order authorise the compulsory acquisition of the park, garden, pleasure ground, or farm, or any part thereof, where they are satisfied that it is of national importance that it should be acquired, so, however, that if the owner so requires the whole of such property, including the mansion-house, if any, shall be acquired." That is followed by a provision that before the order made by the Commissioners comes into effect a draft thereof shall be laid upon the tables of the Houses of Parliament.

In the present case there had been erected before the passing of the Act on part of the park a building for the manufacture of munitions of war. That fact is found by the Commission upon evidence adduced before it, and in respect of which there is no appeal. It appears that a building costing something like

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1,000,000*l.* sterling has been erected in part upon land acquired by agreement with the London and South Western Railway Company, but in part upon land forming a portion of the park. A substantial portion of the building was erected upon the park, and it was a portion of the building as originally designed. It extended beyond the land available which had been acquired by agreement from the London and South Western Railway into the land which formed part of the park. Upon that the Commissioners decided: "This Court doth find and determine that there had been erected on the said land described in the said schedule and edged pink as aforesaid before the passing of the Defence of the Realm (Acquisition of Land) Act, 1916, buildings for the manufacture of munitions of war." That was one of the facts that had to be proved in order to enable the compulsory powers to be exercised with regard to the land edged pink. Then the second point that the Commissioners determined was this: The Court was "satisfied that it is of national importance that the said land described in the schedule and edged pink, including the mansion-house, should be acquired on behalf of His Majesty." That being so, the two facts that were necessary to enable the compulsory powers to be exercised have been established.

The question still remains as to what extent the statute enables those powers to be exercised. Does the statute enable them to be exercised with regard to the whole of the land scheduled, including the buildings thereon, or must the mansion-house be omitted, and do the powers extend to part only of the park? Now "the Commission may by order authorize the compulsory acquisition"—of what?—"of the park, garden, pleasure ground, or farm, or any part thereof." In my opinion, where the preliminary condition has first been satisfied by showing that, "before the passing of this Act, there have been erected on any park, garden, pleasure ground, or farm"—meaning on the park, garden, pleasure ground or farm or any part thereof—"any buildings for the manufacture of munitions of war," then the only limit as to what may be taken in respect of the park, garden, pleasure ground or farm is what is proved to the satisfaction of the Commission to be of national importance should be taken. If the Commission are satisfied by the evidence adduced before it that the whole of the park, garden,

pleasure ground, or farm should in the national interest and as a matter of national importance be taken, then the Commission may sanction the acquisition of the whole. If the Commission are not so satisfied but are satisfied that part only is sufficient to satisfy the national requirements, then part only may be taken.

In my opinion there is no ground for saying that the true interpretation of s. 13, sub-s. 1, is to limit it to such portion as is in the actual occupation of the department, with a reasonable or sufficient curtilage. The Act authorizes the compulsory acquisition of the park, garden, pleasure ground, or farm, or any part thereof. It is not limited to such part thereof as the department was in occupation of, or not limited in any way when the first condition is fulfilled other than by the question of national importance.

For these reasons I am of opinion that there was power to acquire the mansion-house as part of the park. The mansion-house is erected in the park. It is on land in the park, and the land, the site of the house, does not cease to be in the park because a mansion-house is built upon it. The park comprises every portion of it, including the site of the mansion-house with the building erected upon it.

Then it was urged by Sir Ernest Pollock, that if that is so, what sense and meaning was there in the later portion of the sub-section referring specifically to the mansion house—that is to say, that if the Government department acquiring the land proposes to take part only of the property, then power is given to the owner to require the whole of such property to be taken. Now "the whole of such property" means the park, pleasure ground, garden, and the home farm, treating them as together constituting one holding. The owner may require all these to be taken. Then the sub-section adds "including the mansion-house." We were pressed by this in argument: Why are these words, "including the mansion-house," inserted here if the mansion-house was already comprised in the rest of the section? In my opinion they really were only inserted by way of protection to the owner and by way of abundant caution. If the Government department is proposing to take part only of the property, the owner may require them to take the whole of the land,

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including in that the mansion-house as well as the rest of the buildings upon the land. It was only to make it clear, in the interest of the owner, that those words, "including the mansion-house," were inserted.

In my opinion, upon the facts as found by the Commission, the occupying department, on behalf of His Majesty, were entitled to acquire the whole of the premises comprised in the notice to treat. It was asked, especially by Mr. Courthope-Munroe, why should they be entitled to take the stream of water which is fed from a pond or lake and flows through the park, and is utilized in the process of manufacture that is carried on in the buildings. One of the Commissioners in his judgment pointed out that the quantity of water used for manufacturing purposes in this munition building was something like, on an average, 600,000 gallons a day, and five-sixths of such water were drawn from and supplied by this stream. It was not disputed that this volume of water was of very great importance to the work that was being carried on at the factory, but it is asked, Why should it be acquired as part of the park? If the occupying department wish to obtain either the waterway or an easement of a supply of water, it was said, let them take proper proceedings to that end. The answer of the occupying department is that these are the proper proceedings. It is water which comes from the lake which admittedly is in and forms part of the park. It is common ground that the portion of the land beyond the railway comprising the lake or the pond is part of the park and that the stream of water flowing from the pond through the park flows over and through the park. The sluices and arrangements for regulating the water at this pond are situate on and form part of the park. That being so, the occupying department on behalf of His Majesty are taking this park because all of it is required for the purpose of their works, and it is of national importance that the whole should be acquired, that fact having been established to the satisfaction of the Commissioners.

Under those circumstances I am of opinion that the appellant has not shown any ground in law why the judgment under appeal should be deemed to be erroneous. Upon the facts as found by the Commissioners the judgment was, in my opinion, right in law, and the appeal fails.

WARRINGTON L.J. I am of the same opinion.

The appellant is the owner of a certain park with a mansion-house standing upon a part of it. The Railway and Canal Commissioners being satisfied that it is of national importance that the park, including the mansion-house, should be acquired on behalf of His Majesty, have authorized the compulsory acquisition of the park, including the mansion-house. The finding of fact is one with which it is impossible for this Court to interfere, and indeed we are not asked to interfere with it. By the statute under which the jurisdiction is given to the Commissioners it is the Commissioners who are to be satisfied as to the national importance of the acquisition of the land in question, and, accordingly, we have to start here with that finding as one which is binding upon us as well as upon the appellant.

The substantial question which we have to determine is whether the Commissioners had jurisdiciton to authorize the acquisition by the Government department of the mansion-house. That turns upon the construction of the Defence of the Realm (Acquisition of Land) Act, 1916. At the time of the passing of the Act, and for some time previous thereto, the Ministry of Munitions, a Government department, had been in possession of the park, the mansion-house, and the several buildings connected therewith. By s. 3 of that Act it is provided that "Subject to the provisions of this Act, it shall be lawful to acquire by agreement or compulsorily on behalf of His Majesty—(*a*) any land in the possession of an occupying department or any interest in such land; (*b*) any land on over or under which any buildings, works or improvements have, for purposes connected with the present war, been erected constructed or made wholly or partly at the expense of the State, or any interest in such land." Then by s. 12 it is enacted: "For the purposes of this Act, and of the provisions of the Lands Clauses Acts incorporated with this Act, land includes any building or part of a building . . . ." It seems to me clear, therefore, that, so far as s. 3 is concerned, this mansion-house, and all the other buildings within the park included in the land which was in the possession of the occupying department, were capable of being taken compulsorily under that section. But s. 3 is subject to a restriction and modification imposed by s. 13. Sect. 13, sub-s. 1, provides that "Nothing

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in this Act shall authorize the acquisition of any interest in any common, open space, or allotment, or the acquisition otherwise than by agreement of any land which forms part of any park, garden, or pleasure ground, or of the home farm attached to and usually occupied with the mansion-house . . . . or of any interest in such land or grounds." Now, if it is conceded that the owner is entitled to the protection of that provision as regards his mansion-house—and I presume that the owner would not only concede that, but would so contend—then it can only be, I think, because the mansion-house is included in the expression "land which forms part of any park, garden or pleasure ground, or of the home farm"; otherwise, if it were not, it would be included in the general provision of s. 3, and not excluded by the special provision of s. 13. But, in my opinion, no such absurd result as that of excluding from s. 13 the actual site of the buildings is the correct result of the construction of this Act. In my opinion the Act makes it plain that in the expression "land forming part of any park, garden or pleasure ground" is included the land which forms the site of the buildings within the park, garden or pleasure ground, whether those buildings be the mansion-house or any other buildings whatsoever.

So far, then, the mansion-house is excluded from the power of compulsory purchase, but that exclusion is itself subject to a modification contained in clause (*b*) of sub-s. 1 of s. 13, "Where before the passing of this Act there have been erected on any park, garden, pleasure ground, or farm as above mentioned, any buildings for the manufacture of munitions of war," then the Commissioners "may by order authorise the compulsory acquisition of the park, garden, pleasure ground, or farm, or any part thereof, where they are satisfied that it is of national importance that it should be acquired." Now when the Act says if "there have been erected on any park, garden, pleasure ground, or farm as above mentioned, any buildings for the manufacture of munitions of war," of course it is quite obvious that that means where there have been erected on any part of the park, garden, or pleasure ground any building. For that purpose, of course, the site of the mansion-house is not included, because that is already occupied, and this means where any building has been erected on the part of the park not already occupied by a building or where any building which may have been there has been pulled

down. It seems to me there, again, the "park, garden, or pleasure ground, or farm" is the same thing as that which has been referred to in the main part of the section, and it does include the site of the mansion-house or any other buildings; the Act says that in that case the Commissioners may by order authorize the compulsory acquisition of the same thing, the park, and so forth, or any part thereof. The ordinary construction of those words seems to me to be this, that they may authorize the acquisition of the whole of the thing so described if they are satisfied that it is of national importance that the whole thing should be acquired. If they are satisfied that it is of national importance that a part only should be acquired, then they can authorize the acquisition of that part; but it depends entirely on whether or not the Commissioners are satisfied that it is of national importance that the land should be acquired. If they are so satisfied, then, in my opinion, a mansion-house as well as any other part of the park, garden, pleasure ground, or farm may be acquired.

Then it is said that the subsequent provision in sub-s. 1 of s. 13 in favour of the owner, in which the mansion-house is expressly mentioned, shows that the mansion-house was not included in the expression "park" in the earlier part of the sub-section. It seems to me, with all respect, there is nothing in that contention. It is a provision inserted for the protection of the owner. It might conceivably have been contended on behalf of the Government department that they could not be compelled in any case to take what might be an extremely expensive and useless thing to them, the mansion-house standing on the park. In order to exclude any such contention and to put the matter beyond a doubt Parliament has inserted the words "including the mansion-house." It seems to me they have no other effect than that. They are inserted ex abundanti cautela in order to remove a doubt, which might, possibly, have been injurious to the owner.

Then with regard to the pond and the water supply, it is common ground that they also were part of the park, and it follows from what I have said that it was within the jurisdiction of the Commissioners to extend the order to them.

For these reasons, in my opinion, the appeal ought not to succeed, but should be dismissed.

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DUKE L.J. On the facts as they come before us I think it is impossible that this appeal should be sustained. There is no question between the parties that the whole of the land included within the pink border on the plan is within the boundaries of the park. There is no exclusion in the Act of the mansion-house as such from the operation of the Act. If the mansion-house is part of the park, then by the express terms of s. 13, sub-s. 1 (*b*), it comes within the jurisdiction of the Commissioners. If it is not part of the park, then it is land within the general terms of s. 3, and it may be dealt with without regard to the Commissioners. It seems to me that there is no escape on the part of the appellant from the logic of the facts in this case.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Davenport, Cunliffe & Blake, for Gunner & Sons, Bishop's Waltham, Hants.*

Solicitor for Minister of Munitions: *Treasury Solicitor.*

W. I. C.

[IN THE COURT OF APPEAL.]

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July 15.

In re AN ARBITRATION BETWEEN OLYMPIA OIL AND CAKE COMPANY, LIMITED AND MacANDREW MORELAND & CO., LIMITED.

Arbitration—Award—Alternative Form—Award in Form of Special Case—Limited Time for setting down Case—Final Award if Case not set down—Jurisdiction.

An award of arbitrators was made in an alternative form, first, in the form of a special case under s. 7 (*b*) of the Arbitration Act, 1889, if either party should give to the other fourteen days' written notice of his desire to take the opinion of the Court, and should within fourteen days from the service of such notice set the award down for argument before the Court as a special case; and, secondly, in the form of a final award if the above-mentioned notice was not given and the case was not set down for hearing within the prescribed time:—

Held, by Bankes and Scrutton L.JJ., Pickford L.J. dissenting, that the arbitrators had not exceeded their jurisdiction in making their award in that form, and that the award was not bad on its face.

APPEAL from an order of a Divisional Court (Shearman and Sankey JJ.) dismissing a motion to set aside an award.

The award stated as follows:—

1. By contracts in writing dated respectively August 17 and 18, 1917, the Olympia Oil and Cake Company, Limited (hereinafter called the sellers), sold to MacAndrew Moreland & Co., Limited (hereinafter called the buyers), two lots of 100 tons each palm kernel (Twitchell) fatty acids of the usual good quality at 73*l.* 10*s.* per ton ex mill, Selby, October, 1917, delivery. The contracts were on the terms of the sale conditions of the Liverpool General Brokers Association, Limited, which were indorsed thereon.

2. The sellers did not deliver or tender the subject-matter of the contracts, and the buyers claimed arbitration under the rules of the association (1), and the arbitrators duly appointed made an award

(1) The conditions of sale in the contracts provided that in the event of any question or dispute arising the matter should be referred to two members of the association, one to be chosen by each party, such arbitrators having power to call in another member

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in favour of the buyers. The sellers, under the rules of the association, appealed against the award to the appeal committee of the association.

3. Upon the hearing of the appeal the sellers (on February 12, 1918) requested the appeal committee to state in the form of a special case for the opinion of the Court certain questions of law arising in the course of the reference.

"4. We, the appeal committee of the association, decided to make our award in alternative form, viz., first in the form of a special case under s. 7 (*b*) of the Arbitration Act, 1889; and secondly, in the form of a final and conclusive award, our intention being that the sellers shall have the option of taking the opinion of the Court upon the points on which we were requested to state a special case if they so desire, and of such desire shall give notice to the buyers within the time and subject to the conditions hereinafter appointed by us, but that if they shall not so desire and shall not give such notice and comply with the said conditions our award shall be and shall be treated as a final and conclusive award immediately enforceable by action or otherwise without previous recourse to the Court.

"5. In accordance with the said request and decision as aforesaid we now make our award in alternative form as follows:—

"6. If either party shall desire to take the opinion of the Court upon the questions of law on which we were requested to state a special case, and of such desire shall before the expiration of fourteen days from the date hereof give to the other party notice in writing, and shall before the expiration of two weeks from the service of such notice set the award down for argument before the Court as a special case, then subject to the opinion of the Court we hereby make our award in the form of a special case for the opinion of the Court."

[Paragraphs 7 to 29 consisted of the award in the form of a special case, stating the questions of law for the opinion of the Court.]

"30. If on the other hand the notice appointed in paragraph 6 hereof shall not be given by either party, or if either party having given such notice shall fail to duly set down the award for argument before the Court as a special case within the time or times appointed

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of the association as a third arbitrator, the award of any two to be binding subject to an appeal to the appeal committee of the association, whose award should be final and binding on the parties.

by that paragraph, then in such case we award and direct as follows :—

"*Final Award.*

"A. That the sellers do pay to the buyers the sum of 1050*l.* with interest thereon from November 20, 1917, at 5 per cent. per annum.

"B. That the sellers do pay the fees for arbitration before the appeal committee and of this award (which we award to be the sum of 71*l.* 14*s.* 8*d.*).

"C. We award and direct that this our final award shall be read and construed as if it consisted only of paragraphs 1 and 2 and A and B, and as if paragraphs 3 to 30 formed no part of this final award."

The award was made on March 4.

The sellers moved to set aside the award on the grounds (so far as material) that the arbitrators had misconducted themselves in refusing to state a case in accordance with s. 19 of the Arbitration Act, 1889, as to certain questions of law arising in the course of the reference when requested so to do, and in proceeding to make their award without adjourning to allow of an application to the Court; that the award was in excess of the jurisdiction of the arbitrators in that they purported by clauses 4, 5, 6, and 30 to limit the time within which the opinion of the Court could be taken upon the award, and to deprive the parties of their right to take the opinion of the Court thereon, and that by reason of such clauses the award was conditional and void; and that the award was bad in law on the face of it.

The Divisional Court refused to set aside the award. They held that the award was not in excess of the arbitrators' jurisdiction, and said that the practice of making an award in that form was a very convenient one provided that a reasonable time was given to the parties within which to take the opinion of the Court.

The sellers appealed.

Greer K.C. and *Greaves Lord* for the sellers. The appeal committee though asked to state a special case under s. 19 of the Arbitration Act, 1889, did not do so, but proceeded at once to make their award without giving the sellers an opportunity of applying to the Court for an order directing them to state a case. The committee were therefore guilty of misconduct: *In re Palmer & Co. and Hosken &*

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Co. (1); and the award ought to be set aside under s. 11, sub-s. 2, of the Arbitration Act, 1889, or remitted to them under s. 10. The main contention, however, is that the award is bad on its face. There are two awards, one in the form of a special case and the other a final award. Having made one award the committee had exhausted their powers. An award must be final and certain. In *In re Knight and Tabernacle Permanent Building Society* (2) Bowen L.J. defined an award in the form of a special case thus: "He" (the arbitrator) "may state his award in the form of a special case. When that is done, the arbitrator has exhausted his powers; he has made his award in such a shape that the opinion of the Court will determine the rights of the parties, and turn the award into one groove or the other. Therefore the opinion of the Court is, in that case, an effective determination of the rights of the parties." Further, as appears on the face of the award, the committee exceeded their jurisdiction by imposing the condition that the party desirous of taking the opinion of the Court shall within fourteen days give notice thereof to the other party, and shall set the special case down for hearing within fourteen days from the service of such notice. The jurisdiction of arbitrators is consensual, and the sellers have never consented to any such term. The award is bad on that ground also.

Leck K.C. and *C. R. Dunlop* for the buyers. There are not two awards here. There is only one award in alternative form. The power to state a special case or an award in the form of a special case includes all powers incidental thereto provided that the taking of the opinion of the Court is not interfered with. The arbitrators have power to impose conditions upon stating a special case, and they can impose a condition that the party who desires to take the opinion of the Court shall do so within a reasonable time. The arbitrators by imposing that condition are not interfering with any rule of Court. They then provide for the case of neither party being desirous of taking the opinion of the Court upon the special case, and in that alternative they make a final award. That is not in excess of their jurisdiction. The award is therefore good. [They were not called upon on the other point.]

Greer K.C. in reply.

(1) [1898] 1 Q. B. 131. (2) [1892] 2 Q. B. 613, 618.

PICKFORD L.J. This is a motion to set aside an award. The first ground alleged is misconduct in the arbitrators in refusing to state a case in accordance with s. 19 of the Arbitration Act, 1889, and in proceeding to make their award without adjourning so as to enable the applicants to apply to the Court for an order. No doubt the arbitrators did not state a special case in the form asked for, namely, under s. 19 of the Arbitration Act, 1889, but they stated their award in the form of a special case, setting out the questions of law which the sellers desired to raise. The request to state a case was made on February 12, and the award was made on March 4. There was therefore ample time for an application to the Court for an order to state a case in the form in which it was asked for. No such application was made. There is no misconduct in not stating a special case; the misconduct lies in an arbitrator refusing to state a case and in making his award before the party can apply to the Court for an order to state a case. The true answer, however, to the sellers' objection to the award on this point is that the sellers have in substance got what they asked for. They have a case stated for the opinion of the Courts upon the question of law raised, and the case has been stated after all the facts have been found instead of during the course of the reference. I see no reason for setting aside the award upon this ground.

There remains the more important and difficult point. It is said that the arbitrators have made an award in excess of their jurisdiction and that the award is bad on its face. They have made their award in this form. (The Lord Justice read paragraphs 4, 5, and 6 of the award.] They then state their award in the form of a special case, raising the questions which they were asked to state for the opinion of the Court, and paragraph 30 is as follows: [The Lord Justice read it.] The final award follows. The arbitrators have power under s. 7 (*b*) of the Arbitration Act, 1889, to state their award as to the whole or part thereof in the form of a special case for the opinion of the Court. If they do that, there are no rules as to the time within which the special case must be set down for argument. The contention is that arbitrators have no power to say "You shall have a special case, but you must take it on the terms which we impose, and if you do not comply with those terms we make a final award." That contention seems to me to be well

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founded. The condition which the arbitrators have imposed may have been a reasonable condition, but in my opinion it was in excess of their jurisdiction. I do not think that an arbitrator has a right in the special case to impose conditions upon either party taking advantage of it. There are certain legal incidents attached to a special case when stated. This argument was pressed upon us: Suppose the arbitrators had said that they would not state a special case except on the condition that the applicant gave the notice and set down the case for hearing within the times prescribed in the present case, and an application were then made to the Court to order the arbitrators to state a case, would the Court have ordered them to do so without imposing that condition? I can only say for myself that, as at present advised, I do not know. It may be that the Court would not, but it seems to me that that argument does not meet the point. It does not follow that because the Court might have imposed that condition, or refused to make an order unless that condition was accepted, the arbitrators can impose the condition without consent. The effect would be to give to the arbitrators the power of the Court. What the arbitrators have said amounts to this: We make an award in the form of a special case, and if the party asking for the special case elects to comply with the condition which we impose, that is our award. If he does not so elect, then he cannot have the special case, and we make another—a final—award. That, in my opinion, is beyond their jurisdiction. Therefore I think that on this ground the award ought to be set aside. As, however, the other members of the Court do not agree with me, the appeal will be dismissed.

BANKES L.J. I have the misfortune to differ from my Lord upon the point last mentioned by him, namely, the jurisdiction of the arbitrators. What the arbitrators have done is quite out of the common. It may be a reasonable course to take, but that is not the question. The question is whether they had a right to make their award in the form in which they have made it. In my opinion the right view of what they have done is this: They have not made two awards in the sense of one award for x pounds and another award for y pounds, nor have they awarded alternatives in the sense referred to by Shearman J. when he spoke of an award

directing the defendant to marry the plaintiff or to pay 50*l*. They have, in my judgment, made one award only, but have put it in an alternative form, one for the purpose of giving the parties a right to take the opinion of the Court, and the other to become operative if neither party elects to take the opinion of the Court. In my view that is a course which an arbitrator is entitled to take.

The next question is whether in taking that course in this particular case the arbitrators have exceeded their jurisdiction. It is said that the arbitrators had no right to impose a condition as to the time within which either party must elect to adopt the award in the form of a special case. This is a point of considerable difficulty. Sect. 7 (*b*) of the Arbitration Act, 1889, confers upon arbitrators jurisdiction to state their award either in whole or in part in the form of a special case for the opinion of the Court. Neither under the statute nor under any rule of Court is any time prescribed within which the case is to be set down for hearing. The arbitrators therefore were not giving a direction which was contrary either to the statute or to any rule of Court in directing as a condition that the case must be set down within a certain time. The question is whether the Court should set aside the award on the ground that the arbitrators have imposed this term, that if either party wants the award in a form which will enable him to take the opinion of the Court upon it he must act promptly and set the case down for hearing within a certain number of days. There is nothing in the statute or in any rule which directs an arbitrator as to what he is to put into the special case, nor as to the form which the special case is to take, and the only remedy of the party who complains of the form or the substance of the case is to apply to the Court, and the Court may then, if it sees fit, either remit the award to the arbitrator or set it aside; but the Court will not, it seems to me, set it aside unless it comes to the conclusion that the arbitrator has either been guilty of misconduct, or that he has so obviously exceeded his jurisdiction as to the matter about which he was asked to arbitrate that he must be treated as a person to whom it would not be proper to remit the case for his further consideration. I think it is a proper test to consider what the Court would have done if the arbitrators had said to the sellers: We will grant you a special case provided you undertake to set it down within a certain number of days; and the sellers

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had replied: You have no right to impose that condition, and we shall apply to the Court to compel you to state a special case upon the ground that you have refused to do so. In my view the Court would have declined to direct the arbitrators to state a case. The Court would, it seems to me, have taken the view that the arbitrators had not refused; that they had offered to state a case subject to a reasonable condition, and that the sellers ought to have accepted that condition. If that is the true view to take, I cannot see that the arbitrators have been guilty of misconduct or done any wrongful act in inserting in the case itself the condition instead of taking the course I have indicated.

For these reasons I see no ground for saying that the arbitrators have exceeded their jurisdiction in inserting this condition, which seems to me to be a reasonable one, in their award. In my opinion the view taken by the Divisional Court is right, and the appeal fails.

SCRUTTON L.J. It is unnecessary to say that in differing from my Lord in a commercial matter I do so with the greatest hesitation.

This is a motion to set aside an award. I have long held a strong view as to the position which the Court should adopt with regard to arbitrations. In old days there were comparatively few arbitrations and those were of a subordinate nature. Now a great part of the disputes relating to the commercial business of the country is referred to commercial arbitrators, who deal with them according to substance rather than form. In my view it would be very undesirable if many of the old rules of a somewhat technical character were invoked for the purpose of interfering with decisions of commercial arbitrators where no injury in the matter of substance has been done by the form in which those commercial arbitrators have expressed their decisions. The system which some litigants seem to favour of having, in addition to two hearings before the arbitrators and the appeal tribunal, as many hearings as they can get in the law Courts, is one which we ought not to encourage. Hence I approach the decision of this case with a desire not to interfere with the award of commercial arbitrators unless I am satisfied that substantial injustice has been done apart from a question of form.

The first objection to this award is that the arbitrators, having been asked to state a special case under s. 19 of the Arbitration Act, 1889—what is known as a consultative case—have stated it under s. 7 (*b*), which empowers arbitrators to state their award in the form of a special case. There used at one time to be some commercial advantage in having a consultative case, as there is no appeal from the decision of the High Court upon it, but since the decision of the House of Lords in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co.* (1), if the arbitrators act upon a consultative decision and state in their award that they have done so, an appeal lies to this Court and to the House of Lords on the ground of error appearing on the face of the award. There is therefore little difference in the result between a special case stated under s. 7 and one stated under s. 19, and I see no reason for interfering with the award because the arbitrators, having been asked to state a special case under s. 19, have stated it under s. 7.

There remains the question upon which the members of this Court differ. I myself have not seen an award in this exact form before. The arbitrators were acting under the Liverpool General Brokers Association's conditions of sale, a body which obviously attaches great importance to prompt decisions in commercial matters, a view with which I feel sure we all agree. Those conditions provide that the appeal from the arbitrators' award is to be made on the second business day after the award is received, and the appeal committee must meet on the third business day after receipt of the notice. The conditions therefore contemplate that the parties may obtain a decision from the appeal committee of the Liverpool Association within a week after the award has been made. The appeal committee have desired to carry out that requirement of prompt business decision, and they have said to the sellers in effect: "You ask us for a special case. We are quite willing to give you one, but you must deal with it promptly. Our view is that the sellers should pay the buyers 1050*l.* and the fees for arbitration. That is our award, but we state the facts on which we have come to that conclusion in a special case for the opinion of the Court provided that you give the buyers notice within fourteen days and set the case down for hearing in the Court within fourteen days from the service of the

(1) [1912] A. C. 673.

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Scrutton L.J.

notice. If you comply with those conditions, the Court will decide whether our award is right; if you do not, our award stands." That seems to me to be one award. The amount awarded is the same, and the costs awarded are the same. The only condition is that the sellers must deal with the special case promptly. I agree with Bankes L.J. that a proper test to apply is to consider what would have happened if the arbitrators had said, when they were asked to state a case, that they would state one if the sellers undertook to proceed with it within fourteen days, otherwise they would not; and the sellers had replied that they declined to be fettered by the condition and would apply to the Court to direct the arbitrators to state a case. In my view the Court would have refused the application. If the Court would not interfere when the arbitrators made a requirement which seems to me to be a reasonable one, I can see no reason why the Court should interfere with an award which, in my view, expresses in substance that requirement and that requirement only. I can see no objection in substance to what the arbitrators have done, and, that being so, I am anxious not to interfere with the award because it may conflict, if it does, with any old decisions on a matter of form pronounced at a time when commercial arbitrations were much fewer and much less understood than they are at the present day. For these reasons, feeling confident that I am doing justice between the parties, I decline to be any party to sending this award back or setting it aside. If the sellers desire to retain the privilege of proceeding in the law Courts they should not enter into agreements of sale with arbitration clauses in them. If they do enter into such agreements, they should be content with the commercial arbitrators and not embark in these expensive and dilatory excursions in the law Courts.

For these reasons I agree with the decision of the Divisional Court, and think the appeal should be dismissed.

Appeal dismissed.

Solicitors for sellers: *Pritchard, Englefield & Co., for Simpson, North, Harley & Co., Liverpool.*

Solicitors for buyers: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

W. F. B.

JONES *v.* LEWIS AND OTHERS.

[1917 J. 862.]

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July 15, 16.

Local Government — Assistant Overseer — Appointment by Justices — Order of Local Government Board—Construction—Power to make fresh Order—Whether Order and Justices' Warrant valid till quashed by Certiorari—Poor Relief Act, 1819 (59 *Geo.* 3, *c.* 12), *s.* 7—*Poor Law Amendment Act,* 1834 (4 *& 5 Will.* 4, *c.* 76), *s.* 105—*Interpretation Act,* 1889 (52 *& 53 Vict. c.* 63), *s.* 32, *sub-s.* 1—*Local Government Act,* 1894 (56 *& 57 Vict. c.* 73), *s.* 33, *sub-ss.* 1, 4; *s.* 81, *sub-s.* 4.

By s. 7 of the Poor Relief Act, 1819, "It shall be lawful for the inhabitants of any parish in vestry assembled, to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish . . . . and it shall be lawful for any two of His Majesty's justices of the peace . . . . by warrant . . . . to appoint any person or persons who shall be so nominated and elected . . . ."

By s. 33, sub-s. 1, of the Local Government Act, 1894, "The Local Government Board may, on the application of the council of any . . . . urban district, make an order conferring on that council . . . . the appointment of overseers and assistant overseers, the revocation of appointment of assistant overseers . . . ." By sub-s. 4, "The order . . . . shall make such provisions as may seem necessary and just for the preservation of the existing interests of paid officers." By s. 81, sub-s. 4, on a transfer of powers every assistant overseer "shall hold his office by the same tenure and upon the same terms and conditions as heretofore, and while performing the same duties shall receive not less salary or remuneration than heretofore."

By s. 32, sub-s. 1, of the Interpretation Act, 1889, "Where an Act passed after the commencement of this Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

By s. 105 of the Poor Law Amendment Act, 1834, "No rule, order, or regulation of the said [Poor Law] Commissioners . . . . shall be removed . . . . by writ of certiorari into any court of record, except His Majesty's Court of King's Bench at Westminster; and every rule, order, or regulation which shall be removed by writ of certiorari . . . . shall nevertheless, unless and until the same shall be declared illegal by that Court, continue in full force and virtue . . . ."

Before the passing of the Local Government Act, 1894, the plaintiff was nominated and elected assistant overseer by the vestry of

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the parish of Eglwysilan at a salary of 85*l.* a year and was appointed by a warrant of justices. By the operation of orders made under the Act part of the parish was transferred to a new civil parish and it was arranged that the plaintiff should only act for the remaining portion, which was wholly comprised in the urban district of Caerphilly. In 1896 the Local Government Board, acting under s. 33 of the Act, made an order, which by article I. transferred to the Caerphilly Urban District Council "the power of appointing and subject as mentioned in article VI. of revoking the appointment" of the plaintiff. Article VI. provided: "Nothing in this order shall apply to the revoking of the appointment of any person now holding office as assistant overseer in any parish to which this order extends, nor, without his consent, to his re-appointment, and every such assistant overseer shall continue to hold office upon the same terms as at present." In 1912 the vestry nominated and elected the plaintiff assistant overseer at a salary of 250*l.* a year, and he was appointed at this salary by a warrant of justices. In 1913 at the audit of the overseers' accounts objection was taken that the plaintiff's appointment at the increased salary was invalid, but the auditor held that the power to appoint the plaintiff remained with the vestry and the justices, and he disallowed the objection. In 1915 the Local Government Board made an order substituting the following article for article VI. of their order of 1896: "(1.) Nothing in this order shall (*a*) apply to the revocation of the appointment of any person now holding office as assistant overseer in any parish to which this order extends; (*b*) preclude any such person as aforesaid, in the event of his ceasing to hold the said office, from being re-appointed to such office as if this order had not been made. (2.) Every person holding office, or re-appointed as aforesaid, shall hold office by the same tenure and upon the same terms and conditions as would, if this order had not been made, have attached to his holding of the said office, whether on any appointment subsisting at the date of this order or on any appointment made thereafter." In 1916 the vestry again nominated and elected the plaintiff assistant overseer at a salary of 250*l.* a year, and he was appointed at this salary by a warrant of justices, but the overseers declined to pay him more than 85*l.*, and the plaintiff brought an action against the overseers for a declaration that he was duly appointed by the warrants of 1912 and 1916:—

Held, that the words "existing interests" in s. 33, sub-s. 4, of the Local Government Act, 1894, did not include a right to be appointed by the same body as before, but that on the true construction of the Local Government Board order of 1896 the power to appoint the plaintiff at an increased salary had not been transferred to the district council by that order, and therefore the plaintiff was entitled to the declaration claimed.

Semble, that even if the power of appointment had been so transferred, nevertheless the Local Government Board had, by

virtue of s. 32, sub-s. 1, of the Interpretation Act, 1889, power to make the order of 1915 retransferring it to the vestry and the justices.

Semble, further, that the order of 1896 was not made by the Local Government Board in their capacity as successors of the Poor Law Commissioners, and therefore was not affected by s. 105 of the Poor Law Amendment Act, 1834.

ACTION tried before Lush J. without a jury.

On April 6, 1893, at a meeting of the vestry of the parish of Eglwysilan several persons, including the plaintiff, Thomas Jones, were proposed for the office of assistant overseer of the parish, and a poll was demanded, and the plaintiff received an absolute majority of votes. This election was held under s. 7 of the Poor Relief Act, 1819. (1) At a meeting of the vestry on March 22, 1894, it was resolved that the plaintiff be paid a salary of 150*l.* per annum for performing the duties appertaining to the office of overseer of the poor save and except the making and collection of the poor rate and registration of the parliamentary, county, and parochial electors, and that his salary should commence as from Lady Day, 1893.

By a warrant of appointment dated March 28, 1894, two justices appointed the plaintiff assistant overseer. The warrant recited that "the inhabitants of the parish of Eglwysilan in the county of Glamorgan in vestry assembled in the said county on the 6th day of April, 1893, and by adjournment for a poll duly held on the 17th, 18th, 19th, and 20th April, 1893, did nominate and elect Thomas Jones . . . . a discreet person to be assistant overseer of the poor of the said parish and did determine that the duties to be by him

(1) The Poor Relief Act, 1819, s. 7: "It shall be lawful for the inhabitants of any parish in vestry assembled, to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be . . . . executed and performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of His Majesty's justices of the peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor, for such purposes, and with such salary, as shall have been fixed by the inhabitants in vestry . . . ."

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executed and performed should be all such as appertain to and are incident to the office of overseer of the poor save and except the making and collecting of the poor rate and the registration of parliamentary, county, and parochial electors and did fix the yearly sum of 150*l.* as and for the yearly salary of the said Thomas Jones for the execution of the said office, such salary to commence as from Lady Day, 1893."

When the Local Government Act, 1894, was passed the parish of Eglwysilan was situated partly in the urban district of Pontypridd and partly in the urban district of Caerphilly. By the operation of orders made under the Act that part of the parish of Eglwysilan which was in the urban district of Pontypridd was transferred to the new civil parish of Pontypridd. The plaintiff's salary was apportioned in accordance with s. 81, sub-s. 5, of the Act, but, owing to an expectation of changes in the population, it was arranged that he should only act as assistant overseer for that portion of the parish of Eglwysilan which remained, and which was wholly comprised in the urban district of Caerphilly. His apportioned salary for this remaining portion was 85*l.* a year.

On March 23, 1895, the Local Government Board made an order under s. 33, sub-s. 1, of the Local Government Act, 1894 (1), transferring to the Caerphilly Urban District Council the power and duty of appointing overseers for the parish of Eglwysilan, and article II. of the order provided: "Section 5 of the said Act shall, except so far as relates to the power of appointing and revoking the appointment

(1) The Local Government Act, 1894, s. 33: "(1.) The Local Government Board may, on the application of the council of any . . . . urban district, make an order conferring on that council . . . . the appointment of overseers and assistant overseers, the revocation of appointment of assistant overseers . . . . (4.) The order . . . . shall make such provisions as may seem necessary and just for the preservation of the existing interests of paid officers . . . ." By s. 81, sub-s. 4, on a transfer of powers every existing assistant overseer "shall hold his office by the same tenure and upon the same terms and conditions as heretofore, and while performing the same duties shall receive not less salary or remuneration than heretofore."

The Interpretation Act, 1889, s. 32, sub-s. 1: "Where an Act passed after the commencement of this Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

of an assistant overseer, apply to each parish wholly comprised in " the Caerphilly urban district.

By an order dated June 2, 1896, the Local Government Board, acting under s. 33, sub-s. 1, of the Local Government Act, 1894, ordered as follows :—

" Article I. We hereby transfer to the urban district council of each of the urban districts named in the second schedule to this order the power of appointing and subject as mentioned in article VI. of revoking the appointment of any assistant overseer for each parish wholly comprised within the urban district."

" Article VI. Nothing in this order shall apply to the revoking of the appointment of any person now holding office as assistant overseer in any parish to which this order extends, nor, without his consent, to his re-appointment, and every such assistant overseer shall continue to hold office upon the same terms as at present."

Caerphilly was one of the urban districts named in the second schedule to the order.

On September 14, 1905, the vestry of the parish of Eglwysilan passed a resolution increasing the plaintiff's salary from 85*l.* to 200*l.* a year, and on August 17, 1906, two justices executed a warrant which, after reciting that the vestry had on September 14, 1905, nominated and elected the plaintiff to be assistant overseer, and had determined that his duties should be those incident to the office of overseer except the making and collecting of the poor rate, and had fixed his salary at 200*l.* a year, and in addition such sum as might be allowed by the revising barrister for work done in connection with the registration of voters, went on to appoint the plaintiff assistant overseer.

On October 29, 1906, the then overseers having disputed the validity of the appointment of August 17, 1906, and having refused to pay the increased salary, the plaintiff commenced an action against them for salary at the rate of 200*l.* a year.

On January 30, 1907, the Local Government Board, acting under s. 33, sub-ss. 1 and 3, of the Local Government Act, 1894, made a fresh order, of which article I. provided as follows :—

" We hereby transfer to the said [Caerphilly] Urban District Council such of the powers, duties and liabilities of the vestry of each of the parishes [including Eglwysilan] as would, if each of the

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parishes had been a rural parish with a parish council, have been transferred to each of those councils by sub-s. 1 of s. 6 of the Act. Provided that nothing contained in this article shall be deemed to transfer to the said urban district council any powers, duties, or liabilities which may at any time attach to or be vested in the vestry of either of the parishes in relation to the appointment or removal of any assistant overseer or vestry clerk or to any charity."

The above-mentioned action was tried by Bray J. at the Cardiff Assizes, and on March 23, 1907, he delivered a reserved judgment in which he held—(1.) that the effect of the Local Government Board order of June 2, 1896, was to take away the right of the vestry to alter the plaintiff's salary by re-election and renomination, and that therefore the resolution passed by the vestry on September 14, 1905, was invalid; and (2.) that as the warrant of August 17, 1906, was not in the terms of the resolution passed by the vestry on March 22, 1894, coupled with their resolution of September 14, 1905, the original warrant of appointment dated March 28, 1894, was still in force, and on both these grounds the plaintiff's salary was still 85*l.* a year.

On September 19, 1912, the vestry resolved that the plaintiff be paid a salary of 250*l.* a year for performing the duties of overseer except the making and collection of the poor rate and the registration of parliamentary, county, and parochial electors, and on September 28, 1912, the plaintiff agreed to repay the overseers any part of the increased salary that might be surcharged by the district auditor.

On October 1, 1912, two justices by their warrant appointed the plaintiff assistant overseer at the salary of 250*l.* a year.

At the audit of the accounts of the overseers for the half-year ending March 31, 1913, objection was taken to the salary paid to the plaintiff during the half-year to the extent of 50*l.* on the ground that his appointment at an increased salary was invalid, but the district auditor allowed the full salary by a certificate dated January 20, 1914, on the ground that by the operation of the Local Government Board orders of June 2, 1896, and January 30, 1907, the terms of appointment and the remuneration of the plaintiff remained with the vestry and the justices.

The objectors in May, 1914, appealed to the Local Government Board from the decision of the auditor.

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On October 18, 1915, the Local Government Board made an order reciting that doubts had arisen as to the interpretation of article VI. of their order of June 2, 1896, and providing : " The said order dated June 2, 1896, shall so far as regards the urban district of Caerphilly, be read and have effect as if, in lieu of article VI. thereof, the following article had been contained therein, namely :—

" Article VI.—(1.) Nothing in this order shall

" (*a*) apply to the revocation of the appointment of any person now holding office as assistant overseer in any parish to which this order extends ;

" (*b*) preclude any such person as aforesaid, in the event of his ceasing to hold the said office, from being re-appointed to such office as if this order had not been made.

" (2.) Every person holding office, or re-appointed as aforesaid, shall hold office by the same tenure and upon the same terms and conditions as would, if this order had not been made, have attached to his holding of the said office, whether on any appointment subsisting at the date of this order or on any appointment made thereafter."

On October 26, 1915, the Local Government Board wrote to the overseers a letter stating as follows : " Under the order now issued the appointment of the present assistant overseer can be revoked by the vestry and he can be re-elected by them and re-appointed by warrant of justices. If it is intended that he should continue to receive a salary of more than 150*l.* a year, the Board think that, in order to avoid any further difficulty, there should be a fresh appointment, and they therefore propose to defer giving their formal decision on the appeal, pending the settlement of this question."

On November 2, 1916, the vestry nominated and elected the plaintiff assistant overseer at 250*l.* a year as from October 1, 1916, and on November 3, 1916, two justices appointed the plaintiff at this salary.

The overseers from October 1, 1915, to March 1, 1916, paid the plaintiff at the rate of only 150*l.* a year, and from March 1, 1916, paid him at the rate of only 85*l.* a year. The plaintiff therefore brought this action against the overseers, claiming (1.) a declaration that he was duly appointed assistant overseer by the warrants of October 1, 1912, and November 3, 1916, at 250*l.* a year ; (2.) payment

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of the amount due to him on this basis; and (3.) a mandamus to the defendants to make and levy a rate for the purpose of paying his arrears of salary. The defendants pleaded that on October 1, 1912, and November 3, 1916, the power of appointment to the office of assistant overseer was in the Caerphilly Urban District Council and not in the vestry of the parish of Eglwysilan or in the justices; that the construction of the order of June 2, 1896, had been determined by Bray J.; and that the order of October 18, 1915, so far as it purported to alter the order of June 2, 1896, was ultra vires the Local Government Board.

Montgomery K.C. (*Bethune* with him) for the plaintiff. The plaintiff was validly appointed assistant overseer by the warrant of the justices dated October 1, 1912, at a salary of 250*l.* a year. Sect. 81, sub-s. 4, of the Local Government Act, 1894, says that existing officers are to hold office "on the same terms and conditions," but those words do not refer to amount of salary. They refer to the mode of appointment and tenure of the office. The effect of article VI. of the Local Government Board order of June 2, 1896, is that the power to revoke the plaintiff's appointment remained where it did before, and that unless he consented to be re-appointed by the district council the old procedure remained in force, namely, nomination and election by the vestry and appointment by the justices. An increase of salary can only be effected by renomination and re-election by the vestry and re-appointment by the justices. Article VI. could in practice only refer to a re-appointment with a view to an increase of salary. The defendants' contention is that the plaintiff must hold office on the old terms, or, if not, he can only be re-appointed by the Caerphilly Urban District Council. That is what Bray J. held, but s. 81, sub-s. 4, of the Local Government Act, 1894, which shows that the words "same terms and conditions" do not refer to salary, was not called to his attention. The Local Government Board order of October 18, 1915, merely explains the true meaning of their order of June 2, 1896. In any case the order of October 18, 1915, was not ultra vires. Sect. 32, sub-s. 1, of the Interpretation Act, 1889, says that where a body like the Local Government Board are given a power they may carry it out from time to time as required. If the order of June 2, 1896,

means that in the case of existing officers the power of re-appointment was transferred to the district council, that order did not carry out the duty imposed on the Board by s. 33, sub-s. 4, of the Local Government Act, 1894, for one of the plaintiff's "existing interests" was that his appointment, the revocation of his appointment, and his re-appointment should be by the same body. Therefore the issue of the order of June 2, 1896, did not make the Local Government Board functus officio. The order of the Local Government Board of October 18, 1915, is binding until quashed by certiorari; so also are the re-appointments by the justices in 1912 and 1916. The Local Government Board now has the powers of the Poor Law Commissioners. Sect. 105 of the Poor Law Amendment Act, 1834 (1), says that every regulation made by them shall be of force until declared illegal by certiorari. [He cited *Reg.* v. *Bangor Overseers* (2), *Reg.* v. *Oldham Overseers* (3), *Reg.* v. *Bristol Guardians* (4), *Newbould* v. *Coltman* (5), and *Rex* v. *Forrest.* (6)]

Macmorran K.C. (*Herbert-Smith* with him) for the defendants. The only thing that can be looked at with regard to the appointment is the warrant: *Bamford* v. *Iles* (7); *Holland* v. *Lea.* (8) The warrant of the justices of March 28, 1894, purports to be in pursuance of the resolution of the vestry of April 6, 1893. But that resolution fixed no salary; therefore the appointment by the warrant of March 28, 1894, is bad. The plaintiff never has been assistant overseer at all. The Local Government Board order of June 2, 1896, was intended to preserve the pecuniary interests of existing officers. The word "re-appointment" in article VI. of that order means

(1) The Poor Law Amendment Act, 1834, s. 105: "No rule, order, or regulation of the said Commissioners or assistant Commissioners, or any of them, shall be removed or removable by writ of certiorari into any Court of record, except His Majesty's Court of King's Bench at Westminster; and every rule, order, or regulation which shall be removed by writ of certiorari into the said Court of King's Bench shall nevertheless, unless and until the same shall be declared illegal by that Court, continue in full force and virtue, and be obeyed, performed, and enforced, in such and the same manner, and by such and the same ways and means, as if the same had not been so removed."

(2) (1847) 16 L. J. (M.C.) 58, 64.
(3) (1847) 10 Q. B. 700, 702.
(4) (1849) 13 Q. B. 405, 413.
(5) (1851) 6 Ex. 189.
(6) (1789) 3 T. R. 38.
(7) (1849) 3 Ex. 380.
(8) (1854) 9 Ex. 430, 441.

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re-appointment on different terms. Article VI. excluded the power of the urban district council to re-appoint the plaintiff at a different salary. Re-appointment was always necessary with every change of salary. When an assistant overseer is re-appointed, he gets a new office. When there is going to be a change of salary, the old office ceases and the assistant overseer is appointed to a new office. That is only a re-appointment in the sense that the same person is appointed. But it is a new appointment. The power of appointment was transferred by article I. of the order of June 2, 1896, to the urban district council, and with the plaintiff's consent he might be appointed at a different salary.

The decision of Bray J. is in the defendants' favour, though perhaps not absolutely binding as res judicata. After the order of June 2, 1896, the Local Government Board was functus officio. The Interpretation Act, 1889, has no application. The power given to the Local Government Board could by its very nature be exercised only once. The order of June 2, 1896, was not made by the Local Government Board qua Poor Law Commissioners. The Local Government Act, 1894, is not a Poor Law Act. The orders referred to in s. 105 of the Act of 1834 relate only to the administration of the poor law. The question in this case is the same in substance as that decided by Bray J. and should be decided in the same way. The plaintiff is only entitled to a salary of 85*l.* a year.

Montgomery K.C. in reply. The question of the validity of the appointment until quashed does not appear to have been taken before Bray J. The justices act ministerially in making the appointment: *Underwood* v. *Jones*. (1)

LUSH J. This case raises questions of considerable difficulty. The first point taken for the defendants is that the plaintiff has never been duly appointed assistant overseer. It is somewhat extraordinary if that contention is sound, for his position has been recognized not only by the vestry but by the Local Government Board, and in an action brought by him against the overseers Bray J. held that he was assistant overseer, and I think that if there were any doubt that would conclude the matter. It is said that the justices' warrant of appointment dated March 28, 1894, shows that they only

(1) (1891) 60 L. J. (M.C.) 58.

acted on the vestry's resolution of April 6, 1893, whereas the nomination and election of the plaintiff by the vestry were not complete until after the vestry's resolution of March 22, 1894, inasmuch as the vestry's resolution of April 6, 1893, did not define the plaintiff's duties or fix his salary. I do not think that the facts support this contention. It is true that the warrant of March 28, 1894, does not mention the date when the plaintiff's salary was fixed and when his duties were defined, but there is no misstatement in the warrant, and in my opinion it is not defective, and, without relying on the judgment of Bray J., I think that the plaintiff was duly appointed assistant overseer on March 28, 1894. The warrant of appointment dated August 17, 1906, was not, however, in proper form, as it did not conform to the vestry's resolution of September 14, 1905, which was merely a resolution for the increase of the plaintiff's salary from 85*l.* to 200*l.* a year, and did not refer to his duties at all, those duties having already been defined by the vestry's resolution of March 22, 1894, as those "appertaining to the office of overseer of the poor save and except the making and collection of the poor rate and registration of parliamentary, county, and parochial electors." But the warrant of appointment of August 17, 1906, recited that on September 14, 1905, the vestry had determined that his duties should be those incident to the office of overseer except the making and collecting of the poor rate and had fixed his salary at 200*l.* a year, and in addition such sum as might be allowed by the revising barrister for work done in connection with the registration of voters. The validity of the appointment of August 17, 1906, was disputed by certain persons, and the result was the action tried before Bray J., who came to the conclusion that the plaintiff's appointment at the higher salary was invalid upon two grounds—(1.) that the power of re-appointing the plaintiff at an increased salary had been transferred to the district council by the Local Government Board order of June 2, 1896; and (2.) that the warrant of August 17, 1906, was bad. The Local Government Board issued a fresh order on October 18, 1915, which cleared up any ambiguity in their order of June 2, 1896, and made it perfectly plain that it was the intention of the Local Government Board that the power of nomination and election and re-appointment of the plaintiff at an increased salary was to remain with the vestry and the justices.

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Lush J.

It is contended for the plaintiff that there is no ambiguity in the Local Government Board order of June 2, 1896, and that on its true construction the power to re-appoint the plaintiff at an increased salary was not transferred to the district council. For the defendants it is contended that it was so transferred. The view of Bray J. on this point was adverse to the plaintiff, and, though I have felt some doubt whether his judgment on this point is not binding on me, I think I must give effect to my own opinion. Giving the greatest weight to the view taken by Bray J., I think, though with much hesitation, that the plaintiff's contention is right. By s. 33, sub-s. 4, of the Local Government Act, 1894, the Local Government Board were under a duty to make provision for the preservation of the existing interests of paid officers. I do not take the view that the words "existing interests" include the right to be re-appointed by the same body. I think those words refer to remuneration, and the Local Government Board were entitled to transfer to the district council the right to re-appoint the plaintiff at an increased salary. But in my opinion the Local Government Board did not, by the order of June 2, 1896, make any such transfer. Articles I. and VI. of that order are not very happily framed, for one seems to cover more ground than the other. Article I. transfers to the district council "the power of appointing and subject as mentioned in Article VI. of revoking the appointment of any assistant overseer," whereas article VI. says that the order is not to apply to "the revoking of the appointment of any person now holding office as assistant overseer . . . . nor, without his consent, to his re-appointment." It is true that when the assistant overseer's salary is increased this can only be done by a re-appointment. But in my opinion article VI. means that nothing in the order is to apply to the revocation of the appointment, or without his consent to the appointment or re-appointment of an assistant overseer then holding office. That means that quoad re-appointment an assistant overseer then holding office is to remain in the same position as he was in before and the district council are to have nothing to do with it, and in order to make this clear article VI. adds that "every such assistant overseer shall continue to hold office upon the same terms as at present." Those words must have been inserted not merely with reference to amount of salary, for they were not needed for that

purpose, but also with reference to the method of increasing the salary. The fact that that was clearly the intention of the Local Government Board cannot assist one in construing their order, but it is satisfactory to know that my view is consonant with their intention.

That disposes of this case, for it follows that the appointment of 1912 was properly made. But the case for the plaintiff has been further fortified by the contention that, even if article VI. of the order of June 2, 1896, merely excluded the power of the district council to revoke the plaintiff's appointment or without his consent to re-appoint him at a lower salary, the Local Government Board had power to make a fresh order, and, whether this is so or not, that the Court must give effect to the subsequent order which the Local Government Board did make on October 18, 1915, so long as that order has not been quashed on certiorari, and that in any case the warrants of appointment made by the justices in 1912 and 1916 must be treated as valid so long as they have not been similarly quashed. It is not necessary for me to decide any of these questions. I propose only to say that, in view of the decision in *Underwood* v. *Jones* (1), it is plain that in this matter the justices act ministerially, and I do not see how it could be held otherwise, for they seem to have nothing to do except to give effect to the nomination and election by the vestry. With regard to an order made by the Local Government Board, I feel more difficulty as to whether until it is quashed it must be recognized by the Court. There is an express provision in s. 105 of the Poor Law Amendment Act, 1834, with regard to orders made by the Poor Law Commissioners, but I have great doubt whether the Local Government Board, though they have superseded the Poor Law Commissioners, made this order in their capacity as successors of the Poor Law Commissioners. I am inclined to think that they did not, and it does not appear to me that that section applies to an order made by the Local Government Board in their capacity as such.

Then it has been argued that even if the power of re-appointing the plaintiff was clearly transferred to the district council by the order of June 2, 1896, yet the Local Government Board had power to make a fresh order taking it from the district council and giving it

(1) 60 L. J. (M.C.) 58.

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back to the vestry and the justices, and s. 32, sub-s. 1, of the Interpretation Act, 1889, is relied on. In the Local Government Act, 1888, express power was given to the Local Government Board to make amending orders, but there is no such provision in the Local Government Act, 1894, and it is significant that the Interpretation Act, 1889, had been passed in the meantime, and it may be that such a provision was not inserted in the Local Government Act, 1894, because it was unnecessary. Though it is not necessary to express any final opinion, I am strongly inclined to the view that the Local Government Board would have power to make an amending order if they found that the original order did not in their opinion work for the benefit of the district. I cannot see that the Local Government Act, 1894, expresses a contrary intention within s. 32, sub-s. 1, of the Interpretation Act, 1889. If article VI. of the order of June 2, 1896, did not deal with the question who should appoint assistant overseers, as I think it did, yet it seems to me that by reason of s. 32, sub-s. 1, of the Interpretation Act, 1889, the Local Government Board had power to make a fresh order. There must be judgment for the plaintiff for the declaration claimed and for the arrears of his salary, and if necessary there will be a mandamus to the defendants to make and levy a rate out of which to make the payment.

Judgment for plaintiff.

Solicitors for plaintiff: *Smith, Rundell, Dods & Bockett for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for defendants: *Wrentmore & Son, for Spickett & Sons, Pontypridd.*

J. S. H.

Distinguished. DEVINE *v.* LONDON HOUSING SOCIETY, LTD. [1950] 2 All E.R. 1173.

DUNSTER *v.* HOLLIS.

[1917 D. 886.]

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July 23, 24.

Landlord and Tenant—Letting of Premises in separate Rooms—Common Flight of Steps—Control of Lessor—Obligation as to Safety of Steps—Housing, Town Planning, &c., Act, 1909 (9 *Edw.* 7, *c.* 44), *s.* 14; *s.* 15, *sub-s.* 1.

Where a lessor lets rooms in a building to a tenant and retains control of a common staircase and flight of steps the lessor is not under an absolute obligation towards his tenant to keep the steps reasonably safe. The lessor's obligation towards his tenant is, however, not merely to avoid exposing the tenant to a concealed danger or trap of which the tenant has no notice or warning, but is an obligation to take reasonable care to keep the steps reasonably safe, and unless the tenant has been guilty of contributory negligence the visibility of the danger is no defence to an action by the tenant against the lessor for damage caused by their not being reasonably safe.

Hart v. *Rogers* [1916] 1 K. B. 646 dissented from.

Dobson v. *Horsley* [1915] 1 K. B. 634 followed.

The provision of s. 15, sub-s. 1, of the Housing, Town Planning, &c., Act, 1909, that s. 14, which applies to "letting for habitation a house or part of a house" at a rent not exceeding a certain amount according to locality and enacts that "there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation," shall take effect as if the above condition included an undertaking that the house shall be "kept by the landlord in all respects reasonably fit for human habitation," does not impose on the lessor of part of a house an obligation to keep a common flight of steps in repair.

ACTION tried before Lush J., without a jury.

The plaintiff was the tenant of two rooms at the top of a three-storied house in Hoxton, and the defendant was the plaintiff's landlord. The defendant let other rooms in the same house to other tenants. There was a common staircase and there was a common flight of steps, about six or seven in number, leading from the ground floor to the street. The staircase and steps were not part of the subject-matter of the demise to any of the tenants and were retained under the control of the defendant, but were intended for the use of all the tenants and of persons who had occasion to visit the tenants. The steps leading to the street were very old and incon-

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venient and were less than a foot wide, and they slanted downwards towards the street. The plaintiff had noticed that these steps were out of repair. They had been coated with cement some few years before the present action, but the cement on the two lowest steps had given way. When the plaintiff was walking down the steps he tripped and fell at the last step but one. He fell on his leg and the accident turned out to be serious, and he brought the present action against his landlord for damages for personal injuries.

Drury K.C. and *G. H. Head* (for *Cartwright Sharp*, serving with His Majesty's Forces) for the plaintiff.

du Parcq (*Barrington-Ward* with him) for the defendant.

Cur. adv. vult.

July 24. LUSH J. The question what is the correct legal principle to be applied to the facts of this case is by no means easy. The matter to be considered is what is the duty which the lessor of rooms in a house owes to his tenant with regard to a staircase or steps which remain under the lessor's control amd which are intended for the use of the persons in the house? This question has frequently arisen in recent years, and it is not easy to reconcile all the decisions with regard to it. There are three possible standards of obligation on the part of the lessor: First, the lessor may be under an absolute obligation towards his tenant to keep the steps in a reasonably safe condition; or, secondly, the lessor may be under an obligation towards his tenant to take reasonable care to keep the steps in a reasonably safe condition; or, thirdly, the lessor may only be under an obligation towards his tenant to take reasonable care to avoid exposing the tenant to a concealed danger or a concealed trap of which the tenant has no notice or warning. The last is, of course, an obligation of the kind referred to in *Indermaur* v. *Dames*. (1) If the first proposition is the correct one, the result would be that if the steps had suddenly become defective without any fault on the part of the lessor, and in such circumstances that the lessor had no opportunity of observing the defect or of remedying it, he would still be liable in damages to his tenant, and this

(1) (1867) L. R. 2 C. P. 311.

would be a very serious position. If the second proposition is correct, the lessor would only be liable to his tenant if negligence was proved, but if it was proved that the lessor had been negligent and that the accident had arisen through his negligence it would be no answer to say that the defect was visible and obvious or to say that the tenant had had warning or notice of its existence. That circumstance might be relevant on the question whether the tenant was guilty of contributory negligence, but it would not of itself afford any defence to the action. If the third proposition is the correct one, it would be a defence to the action if it were shown that the danger was visible and obvious, or that the tenant had had warning or notice of its existence. The distinction between the second and the third propositions is an important one. I will illustrate it by supposing that the approach to the house would be safe only if there was a balustrade on which a person entering the house could rest his hand. If during the tenancy the balustrade had fallen away, its absence would be visible and obvious and the tenant in walking along the access without it would be exposed to a risk of which he had full notice. But if the lessor's obligation is to take reasonable care to keep that access in a reasonably safe condition, the lessor might still be liable to the tenant although the danger was obvious, because the question for the jury in such a case would be whether the lessor had negligently allowed that access to become unsafe, and the jury might well find in such a case that he had done so, and if they did and there was no contributory negligence the lessor would be liable although the danger was obvious. That illustrates the important distinction between putting the lessor's liability on the ground stated in the second proposition and putting it on the ground in *Indermaur* v. *Dames* (1) as stated in the third proposition.

Those being the three possible views, I have to consider the authorities and to say which is the correct view. The case which has given rise to the difficulty which has been commented on time after time is *Miller* v. *Hancock*. (2) There the action was not brought by the tenant. It was brought by a person who had no contractual relation with the lessor but who had occasion to visit the tenant. There the Court of Appeal apparently laid down

(1) L. R. 2 C. P. 311. (2) [1893] 2 Q. B. 177.

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these wide propositions—(1.) that as between the lessor and the tenant the lessor was under an absolute obligation to keep the access to the premises in a safe condition, and (2.) that a visitor of the tenant has the same right as the tenant himself. Lord Esher in that case, after saying that the only mode of access was by the staircase and pointing out that there was an implied obligation on the part of the lessor towards the tenants to afford them a reasonably safe exit and entrance, went on to deal with the case of tradesmen and others who might have business with the tenants and who would have to use the same access, and held that a similar duty arose towards them. Bowen L.J. and Kay L.J. took the same view. The case cited in support of it in the judgment was *Smith* v. *London and St. Katharine Docks Co.* (1) I would point out with reference to the facts in *Miller* v. *Hancock* (2) that the stairs were in a worn and defective condition and the jury found that they were in an unsafe condition. If *Miller* v. *Hancock* (2) is to be taken as laying down the two propositions which I have just mentioned, it would follow that the first of the three propositions which I mentioned at the beginning of my judgment is the proper one to apply in cases like the present. But *Miller* v. *Hancock* (2) has been often commented on. In *Huggett* v. *Miers* (3) Sir Gorell Barnes P. stated that the decision in *Miller* v. *Hancock* (2) must be taken as applying to the particular facts of that case. *Miller* v. *Hancock* (2) was a case in which there was at all events something in the nature of a trap, and in *Huggett* v. *Miers* (3) the Court of Appeal appear to me to have dissented from the view, if it was intended to be expressed in *Miller* v. *Hancock* (2), that there was an absolute obligation on the lessor towards the tenant's visitors, or even towards the tenant.

In *Lucy* v. *Bawden* (4) Atkin J. had a similar question to deal with and he considered the authorities. He mentioned the effect of *Huggett* v. *Miers* (3) and the supposed decision in *Miller* v. *Hancock* (2), and he came to the conclusion that in *Miller* v. *Hancock* (2) the Court of Appeal did not intend to lay down any such absolute propositions as would appear from a mere cursory reading of the judgment.

(1) (1868) L. R. 3 C. P. 326.
(2) [1893] 2 Q. B. 177.
(3) [1908] 2 K. B. 278.
(4) [1914] 2 K. B. 318.

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In *Lucy* v. *Bawden* (1) Atkin J. said: "On principle it is difficult to see how an obligation could be imposed upon a landlord larger than the obligation to avoid traps. It is plain that he is, in the absence of express or implied agreement, not liable at all for the consequence of letting a house in a state of even dangerous disrepair. If he lets a loft approached by a ladder, a cellar approached by steep steps, or invites access to his premises over a plank, there seems no reason why the person accepting an invitation to use the ladder, the steps, or the plank, should, if injured by no hidden danger, be at liberty to complain that the access was not of a different and safer character. I can see no difference between the use of an unlighted staircase—*Huggett* v. *Miers* (2)—and the use of an unfenced staircase." I desire to point out that in *Lucy* v. *Bawden* (1) Atkin J. was not dealing with an action by a tenant against his lessor. He was dealing with the case of a person who had no contractual relation with the lessor, and when one confines his observations which I have read to that case I entirely agree with them. Unless it has been expressly decided by the Court of Appeal, in which event I should of course follow the decision without making any observations upon it, I do not see how it can be said that a stranger to the lessor can make him liable for damage sustained through a defect in the steps where there is no trap and no concealed danger.

The question arose again in the Court of Appeal in *Dobson* v. *Horsley*. (3) There the action was brought, not by the tenant, but by a stranger to the lessor, and the Court of Appeal held that as there was no trap or concealed danger no cause of action was established. There the judgment of the Court of Appeal in *Miller* v. *Hancock* (4) was considered, and Buckley L.J., after considering the facts of *Miller* v. *Hancock* (4), said: "By allowing a stair to be defective the lessor was exposing them to a trap. He was leading them to think there was something there which was not there. The plaintiff was trapped by something which he was not bound to anticipate, and he suffered injury. That was the basis of the decision in *Miller* v. *Hancock*." (4)

In the following year the same point again arose in *Hart* v.

(1) [1914] 2 K. B. 318, 325.
(2) [1908] 2 K. B. 278.
(3) [1915] 1 K. B. 634, 639.
(4) [1893] 2 Q. B. 177.

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Rogers (1), before Scrutton J. There the plaintiff was the tenant, and therefore the position was not identical with that in the two cases which I have just cited. In *Hart* v. *Rogers* (1) landlords let to a tenant a flat on the top floor of a building but retained possession and control of the roof. Water found its way into the flat through cracks in the roof, and it was held that the landlords were bound to repair the roof, and that they did not discharge this obligation by showing that they took reasonable care to keep it in repair. In that case, as I understand the judgment, Scrutton J. put the liability of the lessor, in a case where the plaintiff was the tenant, on the highest of the three grounds that I have mentioned, and decided that, even in the absence of negligence, the lessor was liable because he had entered into an absolute obligation to keep in proper repair a roof which was under his control. The learned judge dealt with the criticisms which he considered had been passed on the judgments in *Miller* v. *Hancock* (2), and, after referring to the judgment of Atkin J. in *Lucy* v. *Bawden* (3), he said: "I have carefully considered the language of *Miller* v. *Hancock* (2) and have come to the conclusion that, as reported, all the judges imposed an absolute duty to repair on the landlord. I think if the Court, and particularly Bowen L.J., had meant merely to impose a liability for traps on the line of *Indermaur* v. *Dames* (4) they were quite capable of expressing it in clear words and would have done so. If it is to be held that they really meant to limit themselves to imposing either a duty to use reasonable care to repair or a duty to give notice of traps or concealed defects of which the landlord knew and the tenant did not know, it must, in my view, be so held by the Court of Appeal and not by a judge of first instance." Then the learned judge found that there was a breach of the absolute duty, but he did not say whether he was confining his observations to a case where the tenant was suing the lessor or whether he intended them to cover a case where the person suing was a person visiting the tenant. He appears to me, however, to have said that one must take the judgments of the Court of Appeal in *Miller* v. *Hancock* (2) as not having been delivered with reference only to the particular facts but as laying down an absolute principle binding the lessor not only

(1) [1916] 1 K. B. 646, 650.
(2) [1893] 2 Q. B. 177.
(3) [1914] 2 K. B. 318.
(4) L. R. 2 C. P. 311.

as between himself and a stranger, because, if one is to take the judgments of the Court of Appeal without any reservation, it is clear that they apply to both those cases and were not confined to one of them. I feel a difficulty owing to this judgment of Scrutton J. because he was dealing with the case of a tenant and so am I, but in *Groves* v. *Western Mansions, Ld.* (1) I pointed out that the case of *Dobson* v. *Horsley* (2), where the Court of Appeal had qualified their judgment in *Miller* v. *Hancock* (3), had not been brought to the attention of Scrutton J. In *Groves* v. *Western Mansions, Ld.* (1) the facts were again different from those of the present case in this respect, that there the person suing was a stranger, namely, the wife of the tenant, and Bailhache J. and I in those circumstances, notwithstanding what Scrutton J. had said, held, in accordance as we believed with *Dobson* v. *Horsley* (2), that unless the case could be brought within the cases dealing with a trap the plaintiff had no cause of action, and we held that there was no trap. There is another case in the Court of Appeal where I think the judgment is inconsistent with *Miller* v. *Hancock* (3), i.e. if *Miller* v. *Hancock* (3) must be taken as laying down the principle that the lessor is under this absolute obligation, namely, *Norman* v. *Great Western Ry. Co.* (4) There a railway company was sued by a person who had to go to a station yard on business, and one of the questions was what duty was owed by the railway company to a person having occasion to use the railway premises. In the Divisional Court (5) it was held that a railway company was not merely in the position of an invitor who invites persons to come on the premises for business, but was under a statutory obligation to allow the public to go upon its premises, and therefore its duty to a person who availed himself of his right to go upon them was higher than that of a person who merely invited another to go upon his premises; it owed to persons having a right to be on its premises a duty to take reasonable care to see that the premises were in a safe condition. The Court of Appeal took a different view, and Buckley L.J., after dealing with the ascending scale of liability on the part of occupiers towards (1.) trespassers, (2.) licensees, and (3.) invitees, held that

(1) (1916) 33 Times L. R. 76, 77.
(2) [1915] 1 K. B. 634.
(3) [1893] 2 Q. B. 177.
(4) [1915] 1 K. B. 584, 592.
(5) [1914] 2 K. B. 153.

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although the public used railway premises with a right to be there, yet there was no higher duty owing to them by the railway company on that account, and said: "There is nothing either in principle or authority to show that, when a person comes reasonably and properly upon the premises of another as of right, as distinguished from by invitation, there is any higher obligation on the person on whose premises he comes than exists in the case of a person who invites another on to his premises." The Court of Appeal held, therefore, that unless there is a concealed trap of which the injured person had no notice he could not recover. I cannot reconcile that decision with *Miller* v. *Hancock* (1) if *Miller* v. *Hancock* (1) laid down that a lessor was under an absolute obligation to a stranger. *Norman* v. *Great Western Ry. Co.* (2) seems to me inconsistent with any such view as that, and therefore I cannot reconcile it with the view which Scrutton J. took of *Miller* v. *Hancock.* (1) But there is one observation that I desire to make with regard to *Norman* v. *Great Western Ry. Co.* (2) If I thought that Buckley L.J., when he referred to persons going on premises as of right, intended to include persons who had a contractual right, it would simplify my task in the present case, because, if that observation of Buckley L.J. applied to a tenant in the circumstances of the present case, I should only have to say that in a case like this a trap must be proved and that otherwise the plaintiff must fail. But I do not think that Buckley L.J. intended that observation to apply to a case where there is a contractual right to go on the premises.

It was said in *Miller* v. *Hancock* (1) that there was an implied obligation on the lessor to keep the common access to the premises in a safe condition. I take that to be a contractual obligation. It appears to me to be impossible to hold otherwise. A lessor who lets rooms to a tenant and provides a common staircase which the tenant must use must come under an implied contractual obligation to keep the access in a reasonably safe condition, otherwise the tenant cannot enjoy the use of the rooms which he has contracted to take. In the present case I think that the tenant not only had a right, in the sense that he was not a trespasser, to go on the premises, but he had a right arising out of his contract, a right which he could compel the lessor to observe. In those circumstances, has the tenant

(1) [1893] 2 Q. B. 177. (2) [1915] 1 K. B. 584, 592.

first of all a right to treat the lessor as having entered into an absolute obligation to keep the staircase safe? I think not. I differ with hesitation from Scrutton J., but I cannot think that I ought to treat his judgment in *Hart* v. *Rogers* (1) as binding on me in view of the fact that *Dobson* v. *Horsley* (2) was not cited to him, and of the fact that the view which he took appears to me to be inconsistent with the view taken by the Court of Appeal in *Dobson* v. *Horsley* (2) and with the other cases which I have mentioned.

The second question, therefore, is whether the tenant has a right to sue the lessor for damages if he proves that the lessor was negligent in allowing the steps to be out of repair, even though the defect was visible and obvious. In other words, is the lessor merely under an obligation to avoid exposing the tenant to a trap or is he liable if through want of care he allows the premises to be in an unsafe condition? In my opinion the latter is the correct view. I do not see how a lessor who has impliedly undertaken to keep the access reasonably safe can avoid liability by proving that the tenant knew that the steps were old, worn, and defective. That fact may be a good ground for the conclusion that the plaintiff was guilty of contributory negligence, but I must hold that that in itself affords no answer to the action.

It has been contended for the plaintiff that the Housing, Town Planning, &c., Act, 1909, imposes an absolute obligation on the lessor in a case like this. Sect. 14 of that Act provides: "In any contract made after the passing of this Act for letting for habitation a house or part of a house at a rent not exceeding [a certain amount according to locality] there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation." Sect. 15, sub-s. 1, says: "The last foregoing section shall, as respects contracts to which that section applies, take effect as if the condition implied by that section included an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for human habitation." It has been argued for the plaintiff that this provision applies if part of a house is let and another part is unfit for human habitation, and it is further said that a house is not "fit for human habitation" if the steps are out of repair and dangerous. I

(1) [1916] 1 K. B. 646. (2) [1915] 1 K. B. 634.

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Lush J.

do not agree with that argument. I do not think the Act has any application to a case like this. It would be stretching the language of the Act to say that it imposes an obligation on the lessor to keep the steps in repair whether he could or could not know that they were defective, and that it was intended to give the tenant a right of action which at common law he did not possess in a case where the house is fit for human habitation in the ordinary sense but where the steps have become defective.

On the evidence I think that the defendant had ample opportunity to ascertain that the steps needed repair, and I think his negligence has been proved. I do not think that the defendant has proved contributory negligence on the part of the plaintiff. If it is necessary for the plaintiff to prove that there was a concealed trap, I think that he has done so. [His Lordship then considered the amount of damages.]

Judgment for plaintiff.

Solicitors for plaintiff: *Clifford, Turner & Hopton.*
Solicitors for defendant: *Mills, Lockyer & Mills.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1918
July 25.

NORFOLK COUNTY COUNCIL *v.* CHILD.

Landlord and Tenant—Determination of Tenancy—Validity of Notice—Notice enclosed in covering Letter.

An agreement for a yearly tenancy of a small holding provided that the tenancy might be determined by a six months' written notice expiring at any Michaelmas. On March 21, 1917, the agent for the landlords sent to the defendant, who was in arrear with his rent, a written notice to quit on October 11 (old Michaelmas Day), 1917. The notice to quit was enclosed in a letter in which the agent said "I am instructed by the Small Holdings and Allotments Committee to serve upon you the enclosed notice to quit which is intended to terminate your tenancy at Michaelmas next unless they see sufficient reason in the meantime to change their opinion." The tenant claimed that the notice was a conditional notice and therefore invalid. In March, 1916, a notice to quit had also been given to the defendant, whose rent was in arrear, but this notice was withdrawn at the defendant's request upon his paying the rent due :—

Held, that the covering letter on its true construction, read in the light of what happened in the previous year, did not introduce into the notice to quit a condition or a reservation of right to the plaintiffs, and that the notice was valid.

Judgment of the Divisional Court, ante, p. 351, affirmed.

APPEAL from the judgment of a Divisional Court (Lawrence and Avory JJ.) reversing the judgment of the King's Lynn County Court, reported ante, p. 351.

The facts are stated in the report below, and are summarized in the above head-note. It is only necessary to add for the purposes of this report that the evidence was to the effect that the 49*l.* for tenant right valuation (referred to in the judgment of the Court of Appeal) was paid by the defendant as incoming tenant to the plaintiffs, who had undertaken to pay it to the outgoing tenant.

The county court judge held that the notice to quit was conditional and therefore bad, and that that portion of the 49*l.* which was attributable to the unexhausted value of the cake and feeding-stuffs in the land was a sum paid to the plaintiffs as a "premium" within

C. A. 1918

NORFOLK COUNTY COUNCIL v. CHILD.

the meaning of s. 138 of the County Courts Act, 1888, and that therefore he had no jurisdiction. He accordingly gave judgment for the defendant.

The Divisional Court held that the notice was valid, and that no part of the 49*l.* was a premium within s. 138 of the Act. They gave judgment for the plaintiffs. The defendant appealed.

A. H. Poyser (for *Gerald Dodson*, serving with His Majesty's Forces) for the defendant upon the question as to the validity of the notice argued as in the Court below, and contended that *May* v. *Borup* (1) was wrongly decided. Counsel also contended that part, at any rate, of the 49*l.* was a "premium" within s. 138 of the County Courts Act, 1888, and that therefore the jurisdiction of the county court under that section was ousted; and referred to *King* v. *Earl Cadogan*. (2)

Colam K.C. and *Claughton Scott* for the plaintiffs were not called upon.

BANKES L.J. The first point is whether the notice to quit is valid. The ground upon which the notice is said to be bad is this. The notice to quit was accompanied by a letter the effect of which, it is said, is to render the notice a conditional notice or subject to a reservation of right in the plaintiffs which makes it bad. I do not take that view of the meaning of the letter. I read the letter in this way: The defendant in March, 1916, had been in arrear with his rent, and notice to quit had been served upon him. That notice was withdrawn at the request of the defendant upon his paying the rent in arrear. Rent was again in arrear in March, 1917, and notice to quit, which admittedly in itself is good in form, was again given. In my opinion the letter accompanying the notice does not introduce into the notice any condition or reservation of right to the plaintiffs. It merely contains an intimation that the plaintiffs will not withdraw the notice as they did in the previous year unless they see sufficient reason in the meantime to change their opinion. There is nothing in that which can be said to

(1) [1915] 1 K. B. 830.
(2) [1915] 1 K. B. 821; [1915] 3 K. B. 485.

introduce a condition or reservation into the notice to quit. In *May* v. *Borup* (1) there was stronger ground for the contention that a condition or reservation was introduced into the notice to quit, and yet the Divisional Court, as I think properly, construed the document as not introducing a condition or reservation. Upon this point the decision of the county court judge was wrong.

There remains the question of the jurisdiction of the county court under s. 138 of the County Courts Act, 1888. Upon the construction of that section the county court judge came to the conclusion that where a premium had been paid by the tenant to the landlord the jurisdiction of the county court was ousted. It is not necessary to decide that point, and I express no opinion upon it. The county court judge held that the tenant right valuation, amounting to 49*l.*, which was paid by the defendant to the plaintiffs was a "premium" within the meaning of s. 138, and that therefore the jurisdiction of the county court was ousted. In my opinion the tenant right valuation has none of the characteristics of a "premium" within the meaning of that section. In *King* v. *Earl Cadogan* the meaning of a premium was pointed out both in the Divisional Court (2) and in the Court of Appeal. (3) Warrington L.J. said (4): "'Premium,' as I understand it, used as it frequently is in legal documents, means a cash payment made to the lessor, and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained." The present payment of 49*l.* is not of that kind. It is a payment in respect of tenant right valuation. The valuation included, as I understand, some chattels, but I will assume that it was simply a payment in respect of tenant right valuation for the unexhausted manures in the land. As such it is a payment by the incoming tenant to the landlord or to the outgoing tenant for the unexhausted value which the outgoing tenant has left in the land and which will be enjoyed by the incoming tenant, who on leaving will in his turn be paid for any similar unexhausted value which he leaves. It is impossible to bring such a payment within the word "premium" as used in s. 138 of the Act. The county court judge

(1) [1915] 1 K. B. 830.
(2) [1915] 1 K. B. 821.
(3) [1915] 3 K. B. 485.
(4) Ibid. 492.

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was therefore wrong in holding that he had no jurisdiction to entertain the claim. The appeal must be dismissed.

SCRUTTON L.J. and EVE J. agreed.

Appeal dismissed.

Solicitor for plaintiffs: *C. F. Martelli, for Butcher & Andrews, Fakenham.*

Solicitors for defendant: *Beckingsale, Greenwood & Co., for Dudley S. Page, King's Lynn.*

W. F. B.

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July 24, 25, 26.

[IN THE COURT OF APPEAL.]

WHITELEY, LIMITED *v.* HILT.

Hire-purchase Agreement—Option to purchase—Sale by Hirer—Assignability of Contract—Detinue—Conversion—Measure of Damages.

The plaintiffs let a piano under a hire-purchase agreement whereby the hirer had an option to purchase it by payment of a certain number of quarterly instalments, but was to remain a bailee only until the last of the instalments should be paid, the hirer having the right at any time to terminate the agreement by returning the piano to the plaintiffs. The hirer paid several of the instalments, but before they were fully paid sold the piano to the defendant. In an action of detinue and conversion in the county court the defendant paid into Court the amount of the remaining unpaid instalments. The county court judge held that the defendant had acquired the rights of the hirer under the agreement before anything had been done to terminate it, no instalment being then in arrear, that the measure of damages was the amount of the unpaid instalments, and that the plaintiffs were not entitled to recover the piano or its full value, but only the amount paid into Court. On appeal from that decision the Divisional Court held that the defendant had acquired no interest in the piano, for that the hirer by wrongfully selling it had ipso facto repudiated the agreement and had therefore no interest in it to convey; and that the measure of damages was consequently the full value of the piano, and not merely the amount of the instalments remaining unpaid:—

Held, that the judgment of the county court judge was right.

Decision of the Divisional Court, ante, p. 115, reversed.

APPEAL from the decision of a Divisional Court (Salter and Roche JJ.). (1)

(1) Ante, p. 115.

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The action was brought in the county court by the plaintiffs, William Whiteley, Limited, against the defendant, Miss Mina Hilt, for the return of a piano, which they had let to a Miss Nolan under a hire-purchase agreement, and for damages for its detention.

By an agreement dated December 10, 1916, the plaintiffs agreed to let to Miss Nolan, who was then living in a flat at College Court, Hammersmith, the piano in question upon the following terms :— (1.) To pay 2*l.* 13*s.* 11*d.* on signing in consideration of the option of purchase therein granted, and punctually to pay a further 2*l.* 13*s.* 11*d.* quarterly. (2.) To keep the piano in good repair and take all risks. (3.) Not to remove it without the previous consent of the owners. (5.) In case of any breach of the agreement the owners were to be entitled to enter the premises and to retake the piano. The owners agreed : (*a*) That the hirer could at any time during the hire terminate the same by returning the article to the owners. (*b*) The hirer could become the owner of the said article by paying the hire punctually, but should remain merely a bailee until the full sum of 32*l.* 7*s.* was paid. (*c*) Should the owners retake the piano under the terms of the agreement, the hirer should have the right to resume the hiring, provided she paid the arrears of hiring up to the date of repossession and procured a guarantor to the satisfaction of the owners, and paid expenses.

On December 3, 1916, Miss Nolan, having paid all the instalments which were due up to that date, amounting to 13*l.* 9*s.* 7*d.*, sold the contents of her flat, including the piano, for 100*l.* to the defendant, who succeeded her as occupier of the flat. She gave the defendant a receipt for the 100*l.* in the following form :—"40, College Court, Hammersmith. Received of Mina Hilt 100*l.* in full payment for all my furniture, piano, and plate, pictures, linen, carpets, and effects —the whole contents of this flat as set down in the following list. I solemnly declare that the property is my own and that no one has any claim upon it. Received 100*l.* from Mina Hilt. Nina Incledon Widlake, December 3, 1916." Mrs. Widlake was the same person as Nina Nolan. The defendant, in a letter to the plaintiffs dated August 10, 1917, stated that before purchasing she made various inquiries to ascertain that Miss Nolan had the right to dispose of all the contents of the flat ; she inquired of the landlord's agent and his solicitor, and she employed a person to search for bills of sale or

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judgments against her. She added in her letter that she had paid her hard-earned savings in all good faith, and could have taken no more precaution or used greater care than she did.

At the date of the purchase it was not suggested that there had been any breach of the agreement, and four days subsequently, on December 7, 1916, Mrs. Widlake paid to the plaintiffs 2*l.* 13*s.* 11*d.*, which would become due under the agreement on December 10. This payment was unknown to the defendant, and it was not alleged that the defendant was then aware of the hire-purchase agreement. No further payments were made to the plaintiffs by Mrs. Widlake. The amount paid by her was 13*l.* 9*s.* 7*d.*, leaving 18*l.* 17*s.* 5*d.* as the amount required to make up the full sum of 32*l.* 7*s.* The plaintiffs not receiving the remaining hire payments, made inquiries about the piano, and, ascertaining that it remained in the flat and that the defendant was the occupier, on August 9, 1917, they wrote to her demanding the return of the piano. The defendant refused to deliver up the piano, but offered to pay the balance of the instalments remaining unpaid and to give a substantial guarantee for the payment. The plaintiffs refused to accept the offer, and sued the defendant in the county court for detinue and alternatively for conversion of the piano. The defendant paid 18*l.* 7*s.* 5*d.*, together with a sum for costs, into Court in satisfaction of the claim, and set up the defence that the plaintiffs were not entitled to more than that amount. The county court judge gave judgment for the defendant. On appeal from his decision the Divisional Court held that the defendant had acquired no interest in the piano, for that Miss Nolan by wrongfully selling it had repudiated the agreement, and had no interest in the piano to transfer. The plaintiffs were therefore entitled to recover the piano or its full value without giving credit for the instalments which they had already received.

The defendant appealed.

McCall K.C., *S. H. Leonard*, and *Percy Handcock* for the appellant. The county court refused to find that Miss Nolan had been guilty of fraud. It was a strong thing, therefore, for the Divisional Court to overrule the finding of the county court judge who saw the witnesses. Fraud being a question of fact, the Divisional Court had no jurisdic-

tion to reverse the finding of the county court judge. If Miss Nolan purported to sell more than she had, the sale was nevertheless good to the extent of her interest under the agreement. A hire-purchase agreement is within the assignable contracts referred to by Lord Macnaghten in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900). (1)

The only question, therefore, is whether there has been any repudiation by Miss Nolan of the contract, and it is submitted that there has not. There can be no repudiation of a contract by one party to it unless that repudiation has been communicated to and accepted by the other party. The position taken up by the defendant from the commencement has been that she was willing to pay the remaining instalments as they fell due. The piano has not been removed from the premises on which it was originally placed by the plaintiffs. Repudiation of an agreement, like fraudulent sale, is a question of fact. How can the Divisional Court find repudiation in the face of the findings of the county court judge? *Johnson* v. *Stear* (2) and *Donald* v. *Suckling* (3) are striking examples of the effect of a pledgee of chattels parting with the possession of them. The effect of those cases is summed up in Smith's Leading Cases, 12th ed., vol. 1, p. 222. In *Belsize Motor Supply Co.* v. *Cox* (4), which was approved of by Roche J. but disapproved of by Salter J., it was held that the pledgee had an interest in the vehicle pledged, and that therefore the measure of the damages was not the full value of the vehicle but only the value of the owner's interest therein, i.e., the amount of the hire and purchase money remaining unpaid. If, therefore, after Miss Nolan had paid the instalment due on December 10, 1916, the defendant had tendered to the plaintiffs what was due under the contract, she would have had a perfect title. Assuming that the plaintiffs had a cause of action, the utmost they could recover was the amount they were entitled to on December 8. The damages would be limited to the 18*l.* 17*s.* 5*d.* paid into Court. The damages here, whether for breach of contract, trover, or detinue, are the same.

In an action of trover in the case of a hire-purchase agreement, although the plaintiff cannot sue the assignee of the bailee under

(1) [1903] A. C. 414, 417.
(2) (1863) 15 C. B. (N.S.) 330.
(3) (1866) L. R. 1 Q. B. 585.
(4) [1914] 1 K. B. 244.

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the contract, it is necessary to look at the agreement to see what are the rights of the plaintiff and defendant. The law on the subject is, it is submitted, accurately stated in the following passage in Smith's Leading Cases, vol. 1, 12th ed., at p. 265: "A bailee in possession of goods has a good title to them as against a wrongdoer. In an action against a stranger for the loss of the goods through his negligence, the bailee can recover the full value of the goods, whether he is, or is not, answerable to the bailor for the loss; *The Winkfield* (1), overruling *Claridge* v. *South Staffordshire Tramway Co.* (2) The bailee must account to the bailor for what he recovers in respect of the loss: Id. A bailee in possession of goods may recover in trover their full value against a stranger who converts them to his own use: *Turner* v. *Hardcastle* (3), which was the case of a purchaser who had not paid all the instalments of the price. But if the party converting the goods to his own use has an interest in them the plaintiff can only recover the amount of his interest in the goods: *Brierly* v. *Kendall* (4), mortgagee and mortgagor; *Chinery* v. *Viall* (5), purchaser and vendor; *Belsize Motor Supply Co.* v. *Cox* (6), owner against person with whom the hirer under a hire purchase agreement had pledged the goods. Cf. *Johnson* v. *Stear* (7), *Halliday* v. *Holgate*." (8) The judgment of the county court judge was right, and that of the Divisional Court was wrong and should be reversed.

Schwabe K.C. and *E. Wetton* (*Joy* with them) for the respondents. The defendant's case in the Court below proceeded on the footing that Miss Nolan had been guilty of fraud. Her case was that Miss Nolan had fraudulently sold to her property which belonged to the plaintiffs. In *Reg.* v. *McDonald* (9), where an infant over fourteen years of age converted to his own use goods which had been delivered to him by the owner under an agreement for the hire of the same, it was held that he was rightly convicted of larceny as a bailee of the goods under 24 & 25 Vict. c. 96, s. 3. The plaintiffs' case is that the defendant acquired no interest in the property whether the sale was fraudulent or not. It was common ground in the Court below that Miss Nolan was a fraudulent person and that the defendant was an

(1) [1902] P. 42.
(2) [1892] 1 Q. B. 422.
(3) (1862) 11 C. B. (N.S.) 683.
(4) (1852) 17 Q. B. 937.
(5) (1860) 5 H. & N. 288.
(6) [1914] 1 K. B. 244, 251.
(7) 15 C. B. (N.S.) 330.
(8) (1868) L. R. 3 Ex. 299, 301.
(9) (1885) 15 Q. B. D. 323.

innocent purchaser. The sale by a bailee terminates all rights under the contract. It is not necessary to prove fraud.

It is submitted (1.) that Miss Nolan at the time of the sale had no right, title, or interest in the piano itself, and (2.) that the sale by her put an end to any right she may have had under the agreement up to the time of the sale. If the sale did not involve the termination of all rights under the agreement, it passed what interest Miss Nolan had under it.

[SWINFEN EADY M.R. Does not the whole case turn upon the question whether the vendor had any saleable interest ?]

Yes. The county court judge has found detinue—that the sale gave no title, but that the plaintiffs must take the sum which Miss Nolan would have had to pay if she had completed her contract. On the question of possession he found in the plaintiffs' favour.

In no case has it been held that the rights of a hirer under a hire-purchase agreement are assignable, and it is submitted that the hirer has no right to assign them. The rights given by clause 5, sub-clause (*c*), of the agreement are rights which Miss Nolan never attempted to exercise and which she lost by the sale.

[SWINFEN EADY M.R. Sub-clause (*c*) must be taken into account in considering the question what damages the plaintiffs are entitled to.]

In actions of detinue the plaintiff is entitled as of right to the return of his goods or their value. The goods under a hire-purchase agreement remain the property of the seller until the payment of the last instalment: *Helby* v. *Matthews*. (1)

[WARRINGTON L.J. Lord Macnaghten in that case did not decide that an option of purchase could not be transferred.]

The hirer is a bailee of the property, and when he parts with it the bailment comes to an end. Clause (*c*) only deals with the contingency of the hirer being in arrear with his instalments and possession of the piano having been actually retaken. It does not affect the question of the hirer parting fraudulently or otherwise with the piano. An assignee cannot take advantage of that clause.

[WARRINGTON L.J. Why should not an option of purchase be sold like any other option ?]

By the sale the hirer repudiates the contract. Parting with

(1) [1895] A. C. 471, 481.

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possession puts an end to the bailment. It is submitted that the agreement is not assignable. In *Loeschman* v. *Machin* (1) it was held that the hirer of a piano who sends it to an auctioneer to be sold is guilty of a conversion; and so is the auctioneer who refuses to deliver it up unless the expense incurred be first paid. By parting with the possession of the piano to a third party without the consent of the owner Miss Nolan put an end to the whole contract.

[SWINFEN EADY M.R. referred to *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900). (2) If the option to take a lease is assignable, why should not an option to purchase a piano be assignable either in law or in reason ?]

That case does not overrule *Helby* v. *Matthews*. (3)

[DUKE L.J. referred to *Robson* v. *Drummond*. (4)]

Parting with possession brings this case within the passage in the judgment of Blackburn J. in *Donald* v. *Suckling*. (5) The option of purchase goes altogether if punctual payments of instalments are not made: *Cramer* v. *Giles*. (6) The punctual payment of instalments is a condition precedent to the exercise of the option of purchase. On failure to pay punctually the owner's rights become absolute. The plaintiffs are entitled to recover their goods back from a third party whether she acquired them bona fide or not.

It is submitted that this contract was not assignable. There is nothing in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (2) to negative that contention. The contract was intended to be performed by Miss Nolan herself.

[DUKE L.J. If she had died, would her legal personal representative have had no interest under the contract ?]

She had no interest which would have passed to her executors, the sale by her having terminated all rights which she previously possessed.

[SWINFEN EADY M.R. referred to *British Waggon Co.* v. *Lea*. (7)]

Where there is a hire agreement without an option of purchase a sale by the hirer puts an end to the contract of bailment. Clause (*c*)

(1) (1818) 2 Stark. 311.
(2) [1903] A. C. 414.
(3) [1895] A. C. 471.
(4) (1831) 2 B. & Ad. 303.
(5) L. R. 1 Q. B. 585, 614.
(6) (1883) Cab. & E. 151; on appeal, sub nom. *Cramer & Co.* v. *Carlton* (1884), *The Times* Newspaper, May 9, 1884.
(7) (1880) 5 Q. B. D. 149.

cannot be considered apart from the bailment. Having sold the piano, Miss Nolan cannot claim any right under clause (*c*). The option of purchase was a mere incident of the bailment: *Fenn* v. *Bittleston* (1), followed and approved in *Donald* v. *Suckling*. (2)

On the question of the measure of damages, in detinue the defendant cannot plead payment into Court of the value of the goods in satisfaction of the plaintiff's claim: *Allan* v. *Dunn* (3); *Eberle's Hotel Co.* v. *Jonas* (4); *Nyberg* v. *Handelaar*. (5)

[SWINFEN EADY M.R. You sued in detinue and trover. Under the old practice you could not combine the two actions.]

Detinue lies by him who has property in a thing certain against him who detains it; upon which the plaintiff shall recover the thing detained in specie: 2 Comyns' Digest, 522; Co. Litt. 286b. Where it was impossible for the plaintiff to get redelivery of the specific goods the judgment before the Common Law Procedure Act, 1854, was in the alternative for their value. The plaintiff always had the right to the possession of the goods, and s. 78 of the Act of 1854 was passed to remedy the defect in procedure. That was followed by Order XLVIII., r. 1, whereby "the Court may . . . . order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property, upon paying the value assessed." Order XXV., r. 69, of the County Court Rules is to the same effect. In both those rules "may" means "must."

[DUKE L.J. When a money value has been put upon the chattel by the plaintiff the Court will not enforce a specific delivery: *Dowling* v. *Betjemann* (6); Day's Common Law Procedure Acts, 4th ed., p. 324.]

Leonard in reply. The contract here was clearly assignable: *Tolhurst's Case* (7); *British Waggon Co.* v. *Lea*. (8) The county court judge held that there had been no default and nothing had arisen to entitle the plaintiffs to retake possession of the piano. Even if there had been a breach, the remedy of the plaintiffs was to retake possession, qualified by the provision that if they did so the hirer had the right to pay up the instalments and recover possession.

(1) (1851) 7 Ex. 152.
(2) L. R. 1 Q. B. 585.
(3) (1857) 1 H. & N. 572.
(4) (1887) 18 Q. B. D. 459.
(5) [1892] 2 Q. B. 202.
(6) (1862) 2 J. & H. 544.
(7) [1903] A. C. 414.
(8) 5 Q. B. D. 149.

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As to repudiation, there is nothing personal about the contract. So long as the instalments are paid and the piano remains on the premises it does not matter by whom they are paid. There is no repudiation unless communicated and accepted : *Frost* v. *Knight.* (1) Fraud only makes the contract voidable, and not void : *Halliday* v. *Holgate.* (2)

Dealing with a chattel as if you had an absolute interest in it whereas your interest is only limited, does not amount to repudiation. Even if the sale was wrongful, the contract was not repudiated : *Donald* v. *Suckling.* (3) There must be no intervening rights such as there are here.

[On the measure of damages he referred to *Johnson* v. *Stear* (4) and Mayne on Damages, 8th ed., p. 477.]

SWINFEN EADY M.R. (after stating the facts). The county court judge decided that the defendant acquired the rights of Miss Nolan (otherwise Mrs. Widlake) under the agreement before anything was or could be done to terminate it, no instalment being then in arrear, and that the measure of the plaintiffs' damage was the amount of instalments unpaid, 18*l.* 17*s.* 5*d.*; and, as that sum had been paid into Court, the plaintiffs were not entitled to recover anything more. He accordingly directed judgment to be entered for the defendant.

It was contended before him that Miss Nolan could not transfer any interest to defendant, as she had fraudulently converted the piano and was guilty of larceny. The judge did not adopt that view of the facts. Defendant said that Mrs. Widlake had told her that she was leaving for America. Apparently no one had any opportunity of communicating with her, or of asking for any explanation of her conduct. It did not appear that there was any defect in the title to any other of the furniture and effects included in the sale for 100*l.*

Under these circumstances it must be remembered that the appeal given by s. 120 of the County Courts Act, 1888, is an appeal on a question of law, and it was not open to the Divisional Court to take a different view of the facts from that taken by the county court judge and to find that the sale was fraudulent and amounted to a

(1) (1872) L. R. 7 Ex. 111, 118.
(2) L. R. 3 Ex. 299.
(3) L. R. 1 Q. B. 585.
(4) 15 C. B. (N.S.) 330.

repudiation of the hire-purchase agreement. The fact that after the sale the vendor paid the next instalment to the plaintiffs would certainly not seem to indicate any intention of repudiating the agreement, but in any case the issues of fact were for the county court judge. Salter J. stated as a fact that at the time of sale the vendor made a false statutory declaration that the piano was her property. This is an error; there was no evidence of any statutory declaration, the only declaration proved being the statement contained in the receipt for the 100*l*.

The ground of the decision by the Divisional Court, namely that the sale was fraudulent and amounted to a repudiation of the agreement and put an end to the interest of the vendor, was not open to that Court upon the finding of the county court judge.

The appellant upon this appeal also contends that the judgment of the Divisional Court was erroneous upon the measure of damages, and that the judgment of the county court judge was right in law. The first question which arises is whether Mrs. Widlake had any interest under the hire-purchase agreement which she could lawfully assign. The plaintiffs insist that the agreement merely amounts to a bailment which was ended by parting with the possession of the chattel bailed, and that the owner thereupon became entitled to its immediate return. It is not disputed that, by virtue of the sale, all the right, title, and interest which Mrs. Widlake could dispose of passed to the defendant. At the date of the sale there had not been any breach of the agreement, and there was not any present right in the plaintiffs to claim the return of the piano. The agreement is not only a letting to hire of a piano; it also confers for a valuable consideration an option of purchase. Moreover, clause (*c*) shows that if default is made in payment of the instalments, or if for any other breach the plaintiffs retake possession of the chattel, the hirer's interest is not thereby terminated, but the hirer has the right to resume the hiring, on paying the arrears of hire up to the date of repossession, and procuring a satisfactory guarantee. Parting with the possession of the piano would not be a breach of the agreement if the piano remained in the flat and was not removed contrary to clause 3. If Mrs. Widlake had let her flat furnished for three years with the piano, the plaintiffs would not have been entitled on that account to retake the piano. The whole terms of the agreement show

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that the contract was not merely a bailment for reward, but that it conferred on the bailee an interest in the chattel. It did not amount to a contract for sale, as the hirer was not bound to purchase. But it did confer on the hirer an absolute right to purchase on complying with the provisions of the agreement. The contract was in my opinion assignable by the hirer, but the assignee could only retain possession of the chattel upon the terms of the contract. There was no right to remove the piano from the flat, nor has it been removed. There is no reason whatever for supposing that any personal element entered into the mind of either of the parties to the agreement, or that it would make any difference to the plaintiff by whom the obligations of the contract were fulfilled, or that there were any grounds for taking this contract out of the well-settled general rule that the benefit of a contract is assignable in equity and may be enforced by the assignee: see *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (1); *British Waggon Co.* v. *Lea.* (2)

The defendant therefore acquired all the interest of the vendor, and moreover she had the right in equity to compel the vendor to pay the remaining instalments to the plaintiffs and enforce for the benefit of the defendant all rights conferred by clause (*c*) of the contract.

It was urged by the respondents that no rights arise under clause (*c*) unless and until the piano has been actually physically recalled and removed from the flat and without legal process. The plaintiffs, however, are claiming possession of the piano in this action, and the Court would not, and ought not to, go through the idle form of ordering the piano to be delivered to them if immediately the defendant would be entitled to an order for the redelivery of it to her. It would be remembered that the arrears of hire and a substantial guarantee were offered and refused. It would be quite wrong to say that when the defendant was willing to comply with the provisions of clause (*c*) she could only become so entitled if she first suffered the inconvenience of a physical removal and if expenses of retaking and removal were first incurred. It follows from what I have said that the true measure of damages recoverable by the plaintiffs is not the whole value of the piano, 28*l.*, but compensation

(1) [1902] 2 K. B. 660; [1903] A. C. 414. (2) 5 Q. B. D. 149.

for the loss actually sustained, and as the defendant was entitled to become the purchaser of the piano on paying 18*l.* 17*s.* 5*d.* that sum only represents the loss sustained by the plaintiffs.

It was urged by Mr. Schwabe that the plaintiffs were entitled to an order for the delivery of the piano itself; but, first, the plaintiffs sued not only in detinue but also in trover to obtain damages for the conversion; and, secondly, the power vested in the Court to order the delivery up of a particular chattel is discretionary, and ought not to be exercised when the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of any special value to the plaintiff, and where damages would fully compensate. In equity, where a plaintiff alleged and proved the money value of the chattel, it was not the practice of the Court to order its specific delivery: see *Dowling* v. *Betjemann.* (1) A bailment may be determined by doing any act entirely inconsistent with the terms of the bailment: *Fenn* v. *Bittleston* (2); but it does not follow from that that if the bailee has any further interest in the chattel of a proprietary kind he forfeits that interest by any dealing with the chattel not warranted by the terms of the bailment. There is no foundation for such a notion: *Donald* v. *Suckling* (3); *Halliday* v. *Holgate.* (4)

Under these circumstances I am of opinion that the appeal should be allowed and the judgment of the county court judge restored.

WARRINGTON L.J. I am of the same opinion. The question is whether under this agreement the hirer on December 3, 1916, had an interest assignable and in fact assigned that interest to the defendant. The agreement refers to a specific ascertained chattel. It describes the nature of the transaction as being an option to purchase. The first payment was to be made in consideration of the option to purchase therein granted. The nature of the interest taken by the hirer under the agreement appears to me to be this: First, a right to retain possession of the chattel so long as she performed the conditions of the agreement. Secondly, an option to purchase the chattel exercisable by payment of the instalments provided for by the contract. Thirdly, in case of failure to pay any

(1) 2 J. & H. 544.
(2) 7 Ex. 152.
(3) L. R. 1 Q. B. 585.
(4) L. R. 3 Ex. 299.

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instalment or breach of any other of the provisions of the agreement and possession thereupon taken by the plaintiffs, the right to have restored first her right to possession and secondly the option of purchase upon performing the conditions prescribed by the agreement. That, in my opinion, was the interest of the hirer. The general property in the chattel no doubt remained in the plaintiffs, but that general property in it was qualified and limited by the contractual interest conferred by the agreement upon the hirer.

Now, was that interest assignable ? In my opinion it clearly was. It is unnecessary to do more than to refer to what was said by Lord Macnaghten in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (1) and to a similar statement made by Lord Lindley in the same case. Lord Macnaghten says (2): "It is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee." Lord Lindley in the same case says (3): "My Lords, if the above agreement had been with an ordinary individual his interest would, on his death, have passed to his executors or administrators; or if he had become bankrupt, his trustees could have claimed it and have sold it for the benefit of his creditors. It follows that on the same supposition he could have assigned such interest in his lifetime."

The plaintiffs, if they sought to deny that this agreement was assignable, should have put forward something which would take the case out of the general rule. That it was quite impossible for them to do. The agreement therefore, or rather the contractual interest of the hirer in the chattel by virtue of the agreement, was assignable in equity. The result of that is not, of course, to give to the assignee any interest greater or other than that which was possessed by the assignor, but the effect is to give to the assignee as between him and the other contracting party exactly the same interest as that which the assignor had as between himself and the other contracting party.

The next question is, was that interest in fact assigned ? As to that there can be no doubt. The agreement was in general terms for the sale and purchase by the defendant from Miss Nolan of all the furniture, including the piano, which was on December 3 in the flat.

(1) [1903] A. C. 414. (2) Ibid. 420.
(3) Ibid. 423.

It is quite true that Miss Nolan had not at that time the entire property in the piano, but she had an interest, and as between her and the purchaser there can be no doubt that such interest as she in fact had would pass by the agreement to the purchaser. The interest therefore of the hirer, as I have described it, became vested in the purchaser, the present defendant. Now how did that qualify the right of the plaintiffs to this chattel? In my opinion the rule is as stated by Channell J. in *Belsize Motor Supply Co.* v. *Cox* (1): "Where the defendant has an interest in the goods and chattels converted, then the measure of damages is the value of the plaintiff's interest as between himself and the defendant." Now the value of the plaintiff's interest as between himself and the defendant was clearly the amount of the unpaid instalments. Those unpaid instalments were paid into Court, and in my judgment the plaintiffs in the action of conversion had no right to recover anything more than that sum. But the plaintiffs say: "We are suing in detinue, and suing in detinue we are entitled to have the chattel itself delivered up." The answer to that seems to me to have been given in the judgment of the Master of the Rolls, and I do not propose to add anything further except to point out that it is not true in this case that the plaintiffs were simply suing in detinue. The plaintiffs were suing in detinue and in conversion, and by so suing they gave to the defendant the option of taking them at their word and paying into Court the amount of the damages properly recoverable in an action of conversion.

I have only one word to add with regard to the judgment of the Divisional Court. In my opinion, with the greatest respect, the Divisional Court was wrong, first, in assuming, without a finding of fact on the part of the county court judge, that the contract was a fraudulent contract on the part of Miss Nolan. I think it is quite consistent with the facts of this case that she never intended to commit any fraud at all, but intended to give to the purchaser such interest as she had. Certainly there is no ground for the suggestion that she intended to commit any fraud as against the plaintiffs. Secondly, I desire to say that in my judgment, with all respect, the learned judges in the Divisional Court ignored the complex nature of this contract, treating it as a contract of bailment simply, and

(1) [1914] 1 K. B. 244, 252.

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nothing else. If it had been a contract of bailment simply, then it may be that an act of the bailee inconsistent with the bailment would have put a complete end to that contract. A very good example of that is found in the case of *Mulliner* v. *Florence*. (1) That was a case of the deposit with an innkeeper which was destroyed, as one would expect, by parting with possession, which was the essence of the agreement. But in a complex contract of this nature it by no means follows that because that part of the contract which is a contract of bailment is at an end the other part of the contract, which confers a proprietary interest, is also at an end. In my opinion the judgment of the county court judge was right, and ought to be restored.

DUKE L.J. I agree with the judgments which have been delivered, and I should add nothing if it were not that the Court is reversing the judgment of the Divisional Court. I differ from that judgment because I attribute a value, which the learned judges did not, to the option of purchase which Miss Nolan acquired under the agreement with the plaintiffs. The main question in the case is whether the interest so acquired was assignable.

The opinion of Lord Macnaghten upon which the judgment of the House of Lords proceeded in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (2) sets forth the general rule that the benefit of a contract is assignable in equity and may be enforced by the assignee, and recognizes also the principle that where in an executory contract the personal skill of a party or personal confidence reposed in a party is involved in the due performance of the contract on his part that party cannot assign the benefit of the contract as against the party who is to have the benefit of such personal skill or to have the performance of the contract conditioned by such personal confidence. The assignability of contracts extends to a contractual relationship as intimate as that of landlord and tenant, but it does not extend to cases where personal performance is of the essence of the contract: *Robson* v. *Drummond* (3); *British Waggon Co.* v. *Lea*. (4) It was hardly

(1) (1878) 3 Q. B. D. 484.
(2) [1903] A. C. 414, 417.
(3) 2 B. & Ad. 303.
(4) 5 Q. B. D., per Cockburn C.J., p. 153.

disputed in the present case that the plaintiffs' interest under the contract could have been assigned. No reason was shown either for supposing that in case of the death of the hirer her legal personal representative could have been lawfully denied the benefit of the option of purchase. In the Court of Appeal in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1900) (1), as in the House of Lords, the practical inquiry was made, "Could an assignee perform the assignor's part of the agreement without detriment to the rights of the contracting party of the other part?" In this case it is conceded for the plaintiffs that the obligation of the hirer under paragraphs 1 to 4 of the agreement could be performed as adequately by some other person, but the undertaking for leave to re-enter under paragraph 5 is said to be personal and not capable of performance by deputy. Nothing was advanced in argument, however, to show that the latter part of paragraph 5 adds anything in substance to the right of the plaintiffs to resume possession of the piano by peaceable means in case of default of the hirer. On the whole I am of opinion that there is not in the words of the agreement which create the option of purchase anything to support the contention that the hirer's obligation could be performed only by Nina Nolan, and therefore I hold that the benefit of the option granted by the plaintiffs to Nina Nolan was capable of assignment, and was assigned by her to the defendant. I see no ground for the contention that Nina Nolan defeated the effect of any assignment which she could lawfully make by purporting to assign the piano without any reservation of or in disregard of the proprietary rights of the plaintiffs. There are no findings of fact by the learned judge in the county court to support the conclusion stated in the Divisional Court that Nina Nolan by a fraudulent repudiation of her agreement with the plaintiffs had forfeited all her interest. *Halliday* v. *Holgate* (2) shows that a sale by a pledgee of chattels, although technically wrongful, does not necessarily revest the chattels in the pledgor, and there seems to me to be no good reason here for saying that a hirer of a chattel must lose an option of purchase of the chattel by entering into an agreement for an absolute sale. The question whether there has been an offer of rescission of an executory contract and acceptance of such offer must, I think, be a question of fact, and I see no evidence to warrant

(1) [1903] A. C. 414, 417. (2) L. R. 3 Ex. 299.

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a finding that the hirer so behaved as to manifest an intention to repudiate the contract. She certainly communicated no such intention to the plaintiffs.

As to the form of the judgment, counsel for the respondents insisted that the default of the hirer in making the later payments under the agreement entitled them as of right to a judgment for delivery of the piano with some damages for its detention. His argument was based upon the form of the rules as to judgment in detinue. As to the present case, I agree with what has been said by Warrington L.J. as to the effect of the plaintiffs' particulars of demand. They claimed the piano and damages in detinue, and alternatively claimed damages as for a conversion, and thereby gave the defendant her choice of paying the damages claimed for conversion in satisfaction of their whole claim. On the general question, however, I am satisfied that the rules do not give a plaintiff in detinue the alleged absolute right. A plaintiff had not that right at common law or in equity before the Judicature Act: see Day's Common Law Procedure Acts, 4th ed., p. 324, in notes; *Dowling* v. *Betjemann*. (1) The Rules of the Supreme Court and the County Court Rules leave it in the discretion of the Court to determine whether judgment for the delivery of the specific chattel ought to issue. In this case it would be idle and oppressive to issue such a judgment and thereupon to declare and give effect to the rights which the Court holds to be vested in the defendant.

I am of opinion that the judgment of the county court should be restored.

Appeal allowed.

Solicitors for appellant: *Peachey & Co.*
Solicitor for respondents: *H. E. Tudor.*

(1) 2 J. & H. 544.

G. A. S

CURTIS & SONS *v.* MATHEWS.

[1918 C. 751.]

1918
July 25, 26, 29.

Insurance—Damage by Fire caused by "war, bombardment, military or usurped power"—Rebellion in Ireland—Warfare between Forces of the Crown and "usurped power"—Bombardment by Crown Forces—Fire caused thereby—Damage to insured Premises—Liability of Insurer.

The plaintiffs' premises in Dublin and the contents thereof were insured by a policy which covered loss and damage "directly caused by war, bombardment, military or usurped power, or by aerial craft (hostile or otherwise) . . . . and fire . . . . directly caused by any of the foregoing, whether originating on the premises insured or elsewhere." The policy contained a proviso that no claim was to attach for "destruction by the Government of the country in which the property is situated." During the currency of the policy certain persons, styling themselves a Provisional Government, proclaimed an Irish Republic and occupied with armed forces the General Post Office and other public buildings in Dublin. The General Post Office was bombarded by the military forces of the Crown with shell, and as a result it caught fire. The conflagration spread and destroyed the plaintiffs' premises and their contents. In an action on the policy:—

Held, that the plaintiffs' loss was caused, not by a mere riot or civil commotion, but by civil strife amounting to warfare; that the policy covered loss from fire caused by a bombardment carried on by the forces of the Crown; that the proviso only applied to the intentional destruction of property by the Government; and that the plaintiffs' loss was, therefore, recoverable under the policy.

ACTION in the commercial list tried by Roche J. without a jury.

The plaintiffs claimed a loss under a policy of insurance dated March 23, 1916, and subscribed by the defendant and others, underwriters at Lloyd's. The policy was expressed to be for "24,500*l.* part of 31,555*l.* on buildings and contents, as per fire specification, of premises situate:—98, 99, Middle Abbey Street, Dublin, against risks as per clause attached hereto." The attached clause was in the following terms: "W. and B. clause. This policy is to cover the risk of loss $\frac{\text{and}}{\text{or}}$ of damage to the property hereby insured directly caused by war, bombardment, military or usurped power, or by

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aerial craft (hostile or otherwise), including bombs, shells, and/or missiles dropped or thrown therefrom, or discharged thereat, and fire and/or explosion directly caused by any of the foregoing, whether originating on the premises insured or elsewhere. No claim to attach hereto for delay, deterioration, and/or loss of market, or for confiscation or destruction by the Government of the country in which the property is situated, or for breakage of glass due to concussion. Only to pay hereon if not recoverable under any other existing policy of insurance."

The facts as stated by the learned judge in his written judgment were as follows:—"The premises 98 and 99, Abbey Street were within 100 yards of the General Post Office in Sackville Street, Dublin. On Easter Monday, April 24, 1916, certain persons styling themselves a Provisional Government proclaimed an Irish Republic, and, apart from some operations in other parts of Ireland, occupied with armed forces, estimated at some 2000 men, various public and other buildings in Dublin, and amongst them the General Post Office. The military forces of the Crown thereupon took action, and, after house and street fighting lasting until Saturday, April 29, the inevitable collapse occurred and the Provisional Government and its followers in arms unconditionally surrendered. In the course of the week the General Post Office was bombarded from both north and south by the military forces of the Crown using 18-pounder field guns. On Friday, April 28, during, and as I hold by reason of, the bombardment of the General Post Office with common shell a conflagration broke out there, spread across Princes Street by means of a highly inflammable barricade constructed by the insurgents out of motor cars and bicycles, and attacked the Hotel Metropole, and then spread backwards from the Sackville Street frontages until by the evening of Saturday, April 29, it had reached and virtually destroyed the buildings and contents on the plaintiffs' premises. The fire brigade had checked, and indeed extinguished, some outbreaks of fire in the city, but they were unable to cope with this outbreak, because, although they arranged with the Government for a temporary suspension of military operations on its side, the firemen were fired upon from the insurgents' side and compelled to desist from the work of extinction. But for this I think the plaintiffs' premises would in all probability have escaped destruction."

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Leslie Scott K.C., *Greer K.C.*, and *R. R. Smylie* for the plaintiffs.

MacKinnon K.C., *Douglas Hogg K.C.*, and *Patrick Hastings* for the defendant.

The following authorities were referred to :—*Drinkwater* v. *London Assurance Corporation* (1), *Langdale* v. *Mason* (2), *Rogers* v. *Whittaker* (3), *Insurance Co.* v. *Boon* (4), and *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.* (5)

Cur. adv. vult.

July 29. ROCHE J. read the following judgment :—The plaintiffs are brassfounders and engineers carrying on business in Dublin, and are the persons interested as assured under a Lloyd's policy of insurance, dated March 23, 1916, subscribed by the defendant as the first of a number of underwriters. [The learned judge referred to the terms of the policy, and, having stated the facts as above set out, continued :] In these circumstances the plaintiffs claim to be entitled to recover a loss under the war and bombardment policy. The defendant disputed liability on grounds which may be summarized as follows : (1.) That although ordinary fire policies in general, and the fire policies of the plaintiffs in particular, exclude and except losses by fire caused by, amongst other things, riots and civil commotions, the policy sued upon is in no sense an assurance against the risks of riot and civil commotion so excluded and excepted, but against war and bombardment risks only. (2.) That what took place in Dublin in Easter week was riot and civil commotion and not within the war and bombardment clause. (3.) That the cause of the plaintiffs' loss was not proved to be war or bombardment or anything covered by the clause, however construed. (4.) That, properly construed, the clause did not cover loss caused by war or bombardment so far as they were made or carried on by the forces of the Crown or Government of these islands. (5.) That the case was expressly met and the claim excluded by the proviso "No claim to attach," &c. The plaintiffs' buildings and their contents were, according to the defendant's submission, destroyed by the Government of the country in which they were situate.

(1) (1767) 2 Wils. 363.
(2) (1780) Park on Marine Insurance, 8th ed., vol. 2, p. 965.
(3) [1917] 1 K. B. 942.
(4) (1877) 95 U. S. 117, 127.
(5) [1918] A. C. 350.

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As to (1.), I think the defendant's contention under this head is correct, and indeed it was not disputed on behalf of the plaintiffs. But with regard to (2.) I cannot accept the defendant's contention. Upon the oral evidence given before me by the plaintiffs and the evidence supplied by the defendant (by consent of the other side) through the medium of a convenient publication styled the "Sinn Fein Rebellion Handbook," I am satisfied that what occurred was more than a riot and more than a civil commotion and was within the war and bombardment clause. Mr. MacKinnon justly observed that you must look at facts and not words. A riot does not, it is true, become a war or a caucus a usurped power merely because grandiloquent words are used to describe them. Mr. MacKinnon relied upon a sentence in the case of *Insurance Co.* v. *Boon* (1) as showing that "usurped power" means in this connection "an internal armed force in rebellion, sufficient to supplant the laws of the land and displace the constituted authorities." I do not, however, think that this sentence is intended as a definition, and if it were I should respectfully disagree with its accuracy. This question is not unilluminated by English authority. In 1767 food scarcity and high prices gave rise to disturbances and destruction of property in Norwich by fire. The case of *Drinkwater* v. *London Assurance Corporation* (2) raised the question whether the plaintiff could recover on a policy against fire, which policy excepted fire occasioned by military or usurped power. The gist of the decision, which is remarkable for the elegance of the judgment of Wilmot C.J., is that the acts were the acts of a common mob dispersed in less than an hour and acting feloniously but not treasonably. It is perhaps worth observation as a matter of interest that just as Wilmot C.J. observed that amongst armies, great guns and bombs, the laws are silenced, so in the present case the Four Courts were seized and made a stronghold by the insurgents, and naturally the Easter sittings could not be begun on the due date of April 27.

In 1780 in *Langdale* v. *Mason* (3) Lord Mansfield directed the jury at length upon the meaning of the words "civil commotion and usurped power." The case arose out of the great disorders in London sometimes known as the Lord George Gordon riots.

(1) 95 U. S. 127.
(2) 2 Wils. 363.
(3) Park on Marine Insurance, 8th ed., vol. 2, p. 965.

That eminent judge plainly intimated his view that an insurrection of the extent then occurring which involved attacks on Government buildings, much firing, and loss of life and property was both a civil commotion and also a levying of war upon the King by a usurped power. Here I cannot doubt that the Dublin rising was not merely felonious, but was treasonable. Further, it had a distinct connection with the war in which this country was engaged against the Central Powers. The Provisional Government in their proclamation claimed "to be supported by gallant allies in Europe"—that is to say, by Germans. The existence of the alliance there is no reason to doubt, though the Germans lacked the gallantry to attempt to support their dupes by themselves venturing into this zone of danger. As to the actual course of the rising in Dublin itself, there was a week of fighting, a suspension of all normal life, a casualty list of over 1300 (see the Handbook, p. 52), and great destruction of property. It is true that the rising was in fact as hopeless as the proclamations of its leaders were vainglorious, but I am satisfied that Easter week in Dublin was a week not of mere riot but of civil strife amounting to warfare waged between military and usurped powers and involving bombardment.

As to the defendant's third ground, the submission was that the plaintiffs had not made out their case in establishing the necessary connection between the loss and the alleged causes. It was hardly suggested that the fire was unconnected with the disturbances so as to be a pure accident, but it was said, no doubt with truth, that there was looting and burning by hooligans and criminals not being insurgents and acting without other motive than a desire for plunder and mischief. I find, however, on the evidence that at the time when the General Post Office and the plaintiffs' premises took fire the streets now in question had for some time been so dangerous by reason of the fighting that looters neither desired nor were able to operate in the material area. I am satisfied that the real and immediate cause of the fire in the General Post Office was bombardment and that the fire spread directly and naturally from the General Post Office to the plaintiffs' premises. Its spread no doubt was helped by the fact that, as the evidence showed, the insurgents had in blocks of buildings opened free communication on the first floor of premises which were in separate

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occupations and therefore, in their natural condition, were separated by party-walls.

As to (4.), the argument was that, assuming a shell fired by the forces of the Crown was the cause of the fire, this was not within the policy, because on the true construction of this particular clause "bombardment and military power" meant the bombardment and power, not of the forces of the Crown, but of enemies. Great stress was naturally laid in this connection on the words "hostile or otherwise" used in connection with aircraft, which, it was said, showed that where the forces of the Crown were intended to be included they were mentioned, and that where mention of them was absent, so also was the intention to include them. But this is really an argument from redundancy and assumes that it is unlikely to occur in commercial documents. Reasons were suggested by Mr. Greer why the words "or otherwise" in connection with aircraft were not redundant and they were reasons of weight; but, quite apart from such reasons, I cannot regard the insertion of words ex abundanti cautela in this later connection as altering or affecting the plain and natural construction of the words in the earlier part of the clause. It is not without interest to observe that in *Rogers* v. *Whittaker* (1) it was argued for the plaintiff in regard to a somewhat similar clause in a fire policy that military power meant only the military power of the Crown, and not that of foreign enemies. This argument was held to be erroneous by Sankey J., and I hold that military power in the present clause includes the military power of the Crown as well as that of its enemies.

As this is my view, it is unnecessary to decide upon the merits of a contention urged by Mr. Greer in reply, namely, that even if the defendant's construction of the clause were correct and enemy action or insurgent action alone were within the ambit of the clause, yet the insurgent action was here the real or effective cause of the fire. In substance the argument was that when once the General Post Office was made a fort by the insurgents, everything else followed from that one cause—bombardment, fire, destruction. This argument derives support from the decision of the Supreme Court of the United States of America in *Insurance Co.* v. *Boon* (2), and Mr. Greer argued that it was in agreement with the reasoning of the learned

(1) [1917] 1 K. B. 942. (2) 95 U. S. 117.

Lords who were parties to the decision of the House in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.* (1) I merely express my doubt whether the argument is sound according to English principles. The view taken in the United States of America in respect of the legal rule as to causation is, I think, not quite the same as that taken by our Courts. But there is very much to be said for the view that, since, as I have already stated, insurgent firing directed against the fire brigade prevented efforts which might and probably would have averted the loss now in question, insurgent action was certainly one of the proximate causes of the loss.

As to (5.), the words "No claim to attach hereto for . . . . destruction by the Government of the country in which the property is situated" no doubt give rise to some difficulty. But, having regard to the language of the war and bombardment clause in general, and having regard to the close connection of the word "destruction" with the word "confiscation," I think that the plaintiffs' counsel was right in saying that what was aimed at and excluded was such intentional and direct destruction of the property as is akin to confiscation, e.g., destruction of goods as unwholesome or dangerous or of buildings as a hindrance to military operations. Requisition and destruction of that description might well be regarded as more proper to be met by compensation by the Government in suitable cases rather than by insurance. However this may be, the defendant's counsel, when asked by me, admitted that on the view they were upholding the word "destruction" must cover partial as well as total loss, however occasioned, so long as it was occasioned by the action of the Government of these islands, and that the words "destruction by" were the equivalent of "loss or damage occasioned by." The defendant's counsel had to concede that on this view, which is the only logical result of their contention, it followed that a sharp contradiction was involved between this part of the clause excluding all results of action by or on behalf of the Crown and the part of the clause relating to aircraft "hostile or otherwise." I hold that this contention of the defendant fails.

It follows that in my judgment the plaintiffs are entitled to succeed in this action. The question remains for what amount are they entitled to succeed. As to this several points were debated which

(1) [1918] A. C. 350.

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I can briefly deal with. A substantial point raised on the pleadings and opened by Mr. Greer disappeared during the course of the hearing. It related to an alleged right in the assurers to be subrogated to the assured's right to certain compensation from the Government. But when the facts were fully ascertained Mr. MacKinnon, for the defendant, very frankly and properly admitted that the position was the same as if the Government had lent the plaintiffs certain moneys pending the determination of the dispute about their right to recover on this policy.

The remaining questions are two in number: (1.) What was the value of (*a*) the buildings and (*b*) the contents, consisting of plant and stock, destroyed? (2.) How much of that value, having regard to the terms of the fire specification referred to in the policy sued upon, can be recovered in this action?

[The learned judge then dealt with the evidence, and determined the amount recoverable by the plaintiffs under the policy.]

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Ranger, Burton & Frost.*
Solicitors for defendant: *Parker, Garrett & Co.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1918
July 12, 15, 16, 30.

BRADFORD OLD BANK, LIMITED *v.* SUTCLIFFE.

[1915 B. 3809.]

Guarantee—Surety — Liability — Payment on Demand— Necessity of Demand—Statute of Limitations—Novation.

In 1894 the plaintiffs agreed to grant to a company a fixed loan of 3600*l.* and to allow an overdraft of 2500*l.* on the company depositing debentures for 6100*l.* and procuring a guarantee from two of its directors. The debentures were deposited, and the directors gave a guarantee (which was expressed as being given to protect the plaintiffs from loss on the realization of the debentures) agreeing to pay to the plaintiffs on demand all sums owing by the company, the amount ultimately recoverable under the guarantee not to exceed 6100*l.* with interest "from the time of default of payment by the company or from the time of your demanding payment thereof from us." In 1898 F. S., one of the guarantors, became insane, and the plaintiffs had notice of this in 1899. The company continued to bank with the plaintiffs until 1907, when the plaintiffs amalgamated with another bank under the name of the United Counties Bank, Limited, selling to the new bank all its debts and the benefit of all securities and guarantees. The 6100*l.* debentures remained registered in the name of the plaintiffs. The new bank continued to use the books of the old bank, a note being made therein to the effect, "United Counties Bank, Limited, as from February 13, 1907." The company's accounts were transferred in those books to the name of the new bank, and the company paid interest on the loan account by cheques drawn on the current account in favour of the new bank. In 1912 the plaintiffs demanded payment from the company of the amounts owing and commenced an action to enforce the debentures, in which they realized a certain sum ; and in 1915 they commenced an action on the guarantee against the defendant as the committee of F. S. for the amounts accrued due on the loan account and current account less the amount realized on the debentures. Lawrence J. held that so far as F. S. was concerned the guarantee ceased as a continuing guarantee in 1899, when the plaintiffs had notice of the lunacy, though the liability for the amounts then accrued due continued ; that as regards the current account it had been satisfied by subsequent payments in ; but that the defendant was liable for the amount then accrued due on the loan account. On appeal by the defendant :—

Held—(1.) that the loan account and the current account could not be treated as one, and therefore that subsequent payments into the current account could not be taken as satisfying the loan

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account; (2.) that the plaintiffs' claim was not barred by the Statute of Limitations, as no cause of action arose against the surety until demand had been made by the plaintiffs, and no demand was made till 1912; (3.) that the transactions arising out of the amalgamation of the plaintiffs with the new bank and the dealings with the accounts, even if these could be said to amount to a novation, did not discharge the surety; and (4.) that the defendant was therefore liable for the amount accrued due on the loan account.

In re Brown's Estate [1893] 2 Ch. 300 approved and followed.

APPEAL from a decision of Lawrence J.

In 1894 Samuel Sutcliffe & Son, Limited (hereinafter called Sutcliffes), arranged with the plaintiffs for a fixed loan of 3600*l.* and a drawing credit account of 2500*l.*, and they agreed to deposit as security their debentures to the extent of 6100*l.* and to procure a guarantee from Frank Sutcliffe and Albert Sutcliffe, two of their directors. A guarantee was accordingly given by Frank Sutcliffe and Albert Sutcliffe in these terms: "In consideration of your opening or continuing a banking account with [Sutcliffes] . . . . we . . . . do hereby jointly and severally guarantee to you and make ourselves jointly and severally, and the executors and administrators of each one of us jointly and severally liable to pay to you on demand all sum and sums of money now due or owing, or which shall become due or owing from [Sutcliffes] to you on their banking account for bills and notes discounted or paid, or to be discounted or paid, and for loans, credits and advances made or to be made to or for the accommodation of or at the request of [Sutcliffes], or for advances made on any bill of exchange . . . . and whether passed to [their] account . . . . or otherwise, in your possession, and for interest, commission and other lawful and usual charges. . . . . The conditions of this our guarantee being as follows: (1.) That the amount ultimately recoverable under this guarantee shall not exceed 6100*l.* with interes thereon at the rate of 5 per cent. per annum from the time of default of payment by [Sutcliffes] or from the time of your demanding payment thereof from us or any one or more of us, whichever event shall first happen." Clause 6: "That neither we nor any or either of us nor any or either of our executors or administrators shall be entitled to require you to accept payment of the amount of this guarantee or any part thereof until you have

demanded payment of such amount." Clause 10: "That this guarantee is given to you to protect you from loss on the realization of debentures of [Sutcliffes] to the extent of 6100*l.*, which debentures have been deposited with you as security for the account or accounts of [Sutcliffes], and that we hereby guarantee you against loss (if any) on the realization by you of the said debentures, the debentures being now taken by you at par." Sutcliffes had then with the plaintiffs a loan account and a current account. In August, 1898, Frank Sutcliffe, one of the guarantors, became insane, and of this the bank became aware in December, 1899. At that time Sutcliffes owed 3400*l.* on the loan account and 269*l.* 5*s.* on the current account. They continued to bank with the plaintiffs till 1907, when the plaintiffs amalgamated with the Birmingham District and Counties Banking Company, Limited, under the name of the United Counties Bank, Limited. At this date 3600*l.* was due on the loan account and 900*l.* on the current account. By the agreement of amalgamation the plaintiff bank sold all its debts and choses in action and the full benefit of all securities and guarantees, and agreed at any time to take such action as the purchasing bank might request to recover any debts due to the plaintiff bank, and to enforce any contract or remedy of or to which the plaintiff bank might be possessed or entitled. The 6100*l.* debentures remained registered in the name of the plaintiff bank. The new bank continued to use the books formerly used by the plaintiff bank, a note being made therein to the effect, "United Counties Bank, Limited, as from February 13, 1907." The current and loan accounts were transferred in those books to the name of the new bank, and Sutcliffes paid interest on the loan account by cheques drawn on the current account in favour of the new bank. In 1912 the plaintiffs demanded payment from Sutcliffes, and in an action to enforce the debentures they realized a sum which with interest amounted to 827*l.* 19*s.* 1*d.* In 1915 the plaintiffs commenced this action against the committee of Frank Sutcliffe, claiming 4280*l.* 3*s.* 4*d.* balance of principal and interest on the loan account, and 1395*l.* 11*s.* 7*d.* principal and interest on the current account less the 827*l.* 19*s.* 1*d.* realized on the debentures.

At the trial Lawrence J. held (1.) that so far as Frank Sutcliffe was concerned the guarantee ceased as a continuing guarantee on the plaintiffs becoming aware of the lunacy though the liability for

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debts then accrued due continued; (2.) that the accrued liability for 269*l.* 5*s.* on the current account had, according to the rule in *Clayton's Case* (1), been satisfied by subsequent payments. This left the accrued liability on the loan account to be considered. For the defendant it was said (1.) that the claim was barred by the Statute of Limitations; and (2.) that the surety was discharged by a novation by which Sutcliffes, the principal debtors, had accepted the new bank as their creditors. On these points Lawrence J. decided (1.) that as interest upon the loan account had been paid by Sutcliffes until shortly before the action was brought the defence of the Statute of Limitations failed; and (2.) that there was no novation.

The defendant appealed. The plaintiffs did not appeal from the findings against them.

Compston K.C. and *Cautley* for the defendant. First, the plaintiffs' claim is barred by the Statute of Limitations, and the fact that interest was paid by the principal debtors does not prevent the statute running in favour of the surety: *Cockrill* v. *Sparkes* (2); *In re Wolmershausen.* (3) The statute runs from the date of the notice to the plaintiffs of the surety's lunacy, i.e., from December, 1899. Where, as in this case, a debt is expressed to be payable on demand, no demand is necessary and the amount is payable at once: *Collins* v. *Denning.* (4)

[SCRUTTON L.J. In *In re Brown's Estate* (5) Chitty J. held that where there is a present debt and a promise to pay on demand, a demand is not considered a condition precedent to an action, but that where there is a promise to pay a collateral sum on demand, e.g. in a covenant by a surety for the principal debtor, then a demand must be made before action brought or before the money can be considered as owing by the collateral debtor. That seems directly opposed to your contention that no demand is necessary in this case.]

In that case Chitty J., in applying *Birks* v. *Trippet* (6), misapprehended the position. A promise by a surety is not, as Chitty J.

(1) (1816) 1 Mer. 572.
(2) (1863) 1 H. & C. 699.
(3) (1890) 62 L. T. 541.
(4) (1699) 3 Salk. 227.
(5) [1893] 2 Ch. 300.
(6) (1666) 1 Wms. Saund. 32.

held it to be, a promise to pay a collateral sum. What is promised is the same sum. In *In re Brown's Estate* (1) a mortgage contained a joint and several covenant by a father and his son to pay the mortgagee 3000*l.* "on demand." The father joined as surety only. Father and son clearly promised to do the same thing, and yet Chitty J. held that a demand was necessary in the case of the father. That cannot be right. The case was wrongly decided and should be overruled.

[PICKFORD L.J. In *Selman* v. *King* (2) it was decided that "when the defendant is chargeable upon a collateral promise, and not for a mere debt, there ought to be a request precisely alleged." The same was laid down in *Hill* v. *Wade.* (3)]

Here there is a direct and not a collateral promise. Even, however, if it can be said that a demand was necessary, the statute runs from the time a demand should have been made: *Colvin* v. *Buckle* (4); *Holl* v. *Hadley* (5); *Reeves* v. *Butcher.* (6) In this case the plaintiffs could have made their demand when they became aware of the lunacy. [*Parr's Banking Co.* v. *Yates* (7) was also referred to.]

Secondly, the surety was released by a novation. As from February 13, 1907, new creditors were substituted, as is clear from the stamp placed on the books, and the effect of that was to release the surety. [They cited *Commercial Bank of Tasmania* v. *Jones* (8), *Rolfe* v. *Flower, Salting & Co.* (9), and *In re National Provincial Life Assurance Society.* (10)]

Thirdly, Lawrence J. wrongly differentiated between the current account and the loan account. These constituted one account only, and by payments into the current account the loan account was wiped out. [They cited *In re Sherry.* (11)]

Patrick Hastings (*Hogg K.C.* and *Horace Douglas* with him) for the plaintiffs. On the point as to the operation of the Statute of Limitations, we do not rely upon the payment of interest by the principal debtors as preventing the statute running in favour of

(1) [1893] 2 Ch. 300.
(2) (1607) Cro. Jac. 183.
(3) (1616) Cro. Jac. 523.
(4) (1841) 8 M. & W. 680.
(5) (1835) 2 Ad. & E. 758.
(6) [1891] 2 Q. B. 509.
(7) [1898] 2 Q. B. 460.
(8) [1893] A. C. 313.
(9) (1866) L. R. 1 P. C. 27.
(10) (1870) L. R. 9 Eq. 306.
(11) (1884) 25 Ch. D. 692.

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the surety ; but, apart altogether from that point, the surety cannot rely upon the statute. This guarantee was in its nature a collateral security for the principal debt, and the surety is only to pay "on demand." The Statute of Limitations did not, therefore, begin to run until a demand had been made: *In re Brown's Estate* (1), which states the same principle as that laid down in *Selman* v. *King*. (2)

[PICKFORD L.J. referred to *Wallis* v. *Scott*. (3)]

Sicklemore v. *Thistleton* (4) and *Hartland* v. *Jukes* (5) also show that a demand is necessary in circumstances like these.

As to novation : An assignment of a debt or a security for it does not discharge the surety : per Knight Bruce and Turner L.JJ. in *Wheatley* v. *Bastow* (6) ; and here all that took place was an assignment from the old bank to the new bank.

On the point that the loan account and the current account were one and the same and that payments into the current account wiped out the loan account, it was never suggested that the bank could place to the credit of the loan account payments made to the current account. The whole course of dealing is opposed to this suggestion.

Compston K.C. in reply. On the question whether a demand was necessary before the surety could be sued no reliance can be placed upon the doctrine laid down in *Selman* v. *King* (2), in view of what Eyre J. said in *Wallis* v. *Scott*. (3) *Sicklemore* v. *Thistleton* (4) is not an authority against the view we contend for, because there the parties expressly stipulated for a demand.

Cur. adv. vult.

July 30. PICKFORD L.J. read the following judgment :—This case arises out of a guarantee given by two of the directors of Samuel Sutcliffe & Son, Limited, for moneys due to the plaintiffs on a loan and current account with that company. The arrangement was that there should be a loan of 3600*l*. and an overdraft of 2500*l*., and that as a security the company should deposit debentures to the extent of 6100*l*. and two directors, Frank Sutcliffe and Albert

(1) [1893] 2 Ch. 300.
(2) Cro. Jac. 183.
(3) (1718) 1 Str. 88.
(4) (1817) 6 M. & S. 9.
(5) (1863) 1 H. & C. 667.
(6) (1855) 7 D. M. & G. 261, 276, 279.

Sutcliffe, should give a personal guarantee for the amount due on the accounts to protect the plaintiffs from loss on the realization of the debentures.

Frank Sutcliffe, one of the guarantors, became insane in 1898, and Lawrence J., who tried the case, found that the plaintiffs were informed of this fact in 1899. The learned judge held that Frank Sutcliffe's guarantee ceased to operate as a continuing guarantee from the latter date, and against this decision there was no appeal. Both parties in the argument before us treated the case on the basis that the continuing guarantee ceased then, but that on that date Frank Sutcliffe's estate remained liable for the debts then accrued due on the accounts. It was, however, argued that this liability had terminated for the reasons discussed later in this judgment.

At the date mentioned there was due to the plaintiffs 3400*l.* on the loan account and 269*l.* 5*s.* on the current account. The learned judge has held that the latter amount has been satisfied by subsequent payments to the credit of the current account, and the plaintiffs accept that position. The only question, therefore, is as to the liability for the 3400*l.* due on the loan account.

It was argued that this amount must also be held satisfied by subsequent payments into the current account exceeding the sum of 3400*l.*, the ground of this argument being that the two accounts must be considered as one. I think there is no foundation for this argument. The facts clearly show that the accounts were to be kept distinct by arrangement between the plaintiffs and the company. If it were otherwise, the company would be extremely hampered in their business, for they could never safely draw on the current account so long as the credit balance did not exceed the amount due on the loan account. The effect of this arrangement is that payments to the credit of the current account are appropriated to that account and cannot be taken in reduction of the loan account.

The defendant also contended that the claim was barred by the Statute of Limitations. The learned judge held that this defence failed because the claim had been kept alive by payment of interest by the principal debtors, the company. I cannot agree with this reason, which seems to me to be contrary to the provisions of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97). But

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another answer was given by the plaintiffs, that is, that the cause of action did not accrue until demand by them, and that no demand had been made until after the realization of the debentures in 1912, less than six years before the commencement of the action. This seems to me to depend upon the construction of the document. A cause of action accrues when all the facts exist which it is necessary to prove as a part of the case: *Reeves* v. *Butcher*. (1) If, therefore, it were necessary for the plaintiffs to prove a demand, the cause of action did not accrue till after the demand. The document is as follows: [His Lordship read the provisions of the guarantee already set out, and continued:] It was argued on behalf of the defendant that the words "on demand" should be neglected because the money was due, and therefore a demand was unnecessary and added nothing to the liability. This proposition is true in the case of what has been called a direct liability—for example, for money lent. There the liability exists as soon as the loan is made, and a promise to pay on demand adds nothing to it, as in the case of a promissory note for the amount payable on demand, and the words "on demand" may be neglected. It has, however, been held long ago in cases more particularly mentioned by the other members of the Court that this doctrine does not apply to what has been called a collateral promise or collateral debt, and I think a promise by a surety to pay the original debt is such a collateral promise, or creates such a collateral debt. This has been so decided by Chitty J. in *In re Brown's Estate* (2), a case which we were invited to overrule. I think, however, it was rightly decided and in accordance with the principle of the earlier cases. The only question, therefore, is whether, on the construction of the guarantee, the parties meant the words "on demand" to mean what they say. I cannot doubt that they did. Interest is to run from demand. Clause 6 makes a demand a condition precedent to the guarantors' power to pay off the amount due, and clause 10 suggests that a demand would be necessary to inform the guarantor of the deficiency left on the realization of the debentures. It may be that the effect of clause 10 is to make the realization of the debentures and consequent loss a fact necessary to prove to establish a cause of action, but I do not think it necessary to decide this. In my opinion there was no cause

(1) [1891] 2 Q. B. 509, 511. (2) [1893] 2 Ch. 300.

of action till after demand, and the plea of the Statute of Limitations therefore fails.

The last defence with which I have to deal is that the surety was discharged by a novation of the debt by which the liability of the company to the plaintiffs was discharged and another bank called the United Counties Bank became the creditors. This arises under the following circumstances. In 1907 the plaintiffs amalgamated with the Birmingham District and Counties Banking Company, Limited, and the amalgamated banks were afterwards known by the name of the United Counties Bank, Limited. The new bank continued to use the books formerly used by the plaintiffs, but the current and loan accounts were transferred in those books to the name of the United Counties Bank, and the company paid interest on the loan account by cheques drawn on the current account in favour of the United Counties Bank. The securities still remained in the name of the plaintiffs, though on the amalgamation all debts and choses in action and the benefit of all securities and guarantees were sold to the new bank by the plaintiffs, who undertook to take such action as was requested by the new bank to enforce any remedies for them. These transactions, and especially the dealings with the two accounts, were said to prove a novation by which the plaintiffs released the company from their debt, which was transferred to the United Counties Bank as creditor, and so discharged the surety. I think it doubtful whether such a novation were effected, but I do not think it necessary to decide this, as I am of opinion that, even if there were such a novation, it does not discharge the surety. There can be no doubt that a novation by which the original debtor is released from his debt discharges the surety, but a transfer of an existing and ascertained debt to another creditor stands on a different footing. In order to discharge the surety it must effect a material alteration in his position. Here the debt was ascertained as long ago as 1899, and the alleged novation did not take place until 1907, the original debtors still remaining liable for the debt. It has been clearly decided in a case by which we are bound that an assignment of the debt does not discharge the surety: see *Wheatley* v. *Bastow*. (1) In that case no notice of the assignment was given to the surety, but the Court seems to assume that if

(1) 7 D. M. & G. 261.

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notice had been given the argument in favour of his discharge would have had even less strength. It seems to me that for all purposes, so far as the interests of the surety are concerned, a novation by which the original creditor releases the debtor has no greater effect than an assignment of the debt with notice to the surety. In either case the transferee of the debt, whether by novation or assignment, is the person with whom the surety has to deal, and, as the liability is already ascertained, it is a matter of no consequence to the surety to whom he has to pay it. The case would be different if it were sought to make the surety liable for a debt arising out of dealings between the new creditor and the debtor, but no such case arises here. I think such a novation, if it existed, does not make any material alteration in the surety's position. It may be that, if it existed, the United Counties Bank, and not the plaintiffs, ought to sue, but this is a mere matter of form, as the two banks are, for this purpose, the same, and an amendment would have been made at the trial if necessary.

The result is that the appeal fails and must be dismissed with costs.

BANKES L.J. read the following judgment :—Both parties accept the view taken by the learned judge in the Court below that the guarantee given to the plaintiff bank by the defendant ceased to be a continuing guarantee as and from December, 1899, the date when formal notice of the defendant having been found a lunatic was given to the bank. At that time the amount due to the bank on the loan account of Samuel Sutcliffe & Son, Limited, was 3400*l.* and upon the current account 269*l.* 5*s.* The learned judge has found, and there is no appeal from that part of his judgment, that the amount due upon the current account was paid off by subsequent payments into that account. The only remaining question, therefore, is whether the defendant is liable for the amount which was still unpaid on the loan account at the time the action was brought. The learned judge held that he was. From this decision the defendant appeals. One point taken on his behalf was that the amounts paid into their current account by Sutcliffes after December, 1899, must be appropriated generally in relief of the defendant as surety for the company, in which case the loan account as well as the current account will be

found to have been paid off. In support of this contention the case of *In re Sherry* (1) was cited. In my opinion this contention cannot be supported. It is, I think, clear that by arrangement between the bank, the company, and the guarantors the two accounts were kept, and were intended to be kept, quite distinct, and that moneys paid into either the one or the other account by the company, or on their behalf, could only be applied by the bank in the manner in which it was directed to apply them. Under these circumstances the surety cannot, in my opinion, contend that, as between himself and the bank, the latter ought to have applied moneys in discharge, or part discharge, of an account to which the bank had no right to apply such moneys.

Another point taken for the defendant was that the claim was barred by the Statute of Limitations. There are, in my opinion, two answers to this contention. The first is that upon the true construction of the guarantee it is really governed by the provision of clause 10, and that it operates only as a guarantee to protect the bank from loss on the realization of the debentures which had been deposited by the company with the bank as security for the same accounts as were covered by the guarantee given by the defendant. Until, therefore, the debentures were realized the bank had no cause of action against the defendant upon the guarantee. The debentures were only realized quite a short time before the action was commenced. This point is in my opinion sufficient to dispose of the plea of the statute. There is, however, a second and equally conclusive answer. The guarantee is in form a joint and several guarantee to pay on demand all sum or sums of money which shall become due and owing from the company to the bank, whether principal or interest. Interest is to be computed from the time of default of payment by the company, or from the time of the bank demanding payment from the guarantors or either of them, whichever shall first happen. If demand before action is an essential part of any cause of action by the bank against the guarantors, then the statute could not commence to run until the necessary demand was made: *Miller* v. *Dell.* (2) Demand was not made until after the debentures had been realized. If, therefore, a demand for payment before action brought was necessary, the action is not barred by the

(1) 25 Ch. D. 692. (2) [1891] 1 Q. B. 468.

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statute. Mr. Compston contended that no demand was necessary, and that the bank could have brought an action at any time without any demand. I do not agree with this contention. In my opinion the document, both from its nature and from its language, indicates that the guarantors stipulated for a demand being made upon them before the bank could enforce the guarantee against them. The authorities from very early times are, I think, clear that in a case like the present an actual demand before action has always been considered necessary. The earliest cases arose on a pleading point upon the question of whether an allegation of a demand de facto was a necessary allegation in a declaration. The older cases are all referred to in the argument of counsel in the case of *Birks* v. *Trippet* (1), and in the notes to that case. I select three as illustrations :—*Waters* v. *Bridge* (2) : Error of a judgment in the Common Pleas, in debt upon an arbitrament of 340*l.*, the award being for that amount for all sums of money laid out by the plaintiff for Elizabeth dum sola fuit, cum inde requisitus esset ; the Court held, secondly, "the arbitrament is to pay 340*l.*, cum inde requisitus esset : so, request being part of the agreement, there ought to be an express request alleged ; and licet saepius requisitus will not serve : and it is not like to debt due upon a bond or upon contract ; for there the debt being due by specialty or contract, needs not a special demand, but licet saepius requisitus will serve ; but being due by arbitrament, cum requisitus fuerit, it is not due, but according to the arbitrament upon special demand. And of that opinion was all the Court." In *Hill* v. *Wade* (3), "Assumpsit in consideration that he would buy such land of the defendant, and pay unto him 40*l.* for it, the defendant promised to pay to the plaintiff 9*l.* which I. S. owed to the plaintiff, when he should be thereunto required. . . . . The Court resolved, that forasmuch as it is a stranger's debt, and was no duty by the defendant before the promise, nor payable but upon request, and so no breach until request be made ; therefore to enable the plaintiff to the action, an express request ought to have been alleged, and a saepius requisitus will not serve. Houghton J. took this difference where a request is upon a duty ; as if I sell an house for 5*l.*, to be paid upon request, there a licet saepius requisitus is

(1) 1 Wms. Saund. 32. (2) (1620) Cro. Jac. 639.
(3) Cro. Jac. 523.

sufficient: and where it is upon a collateral matter; for there he ought actually to allege a request, although issue be joined upon the assumpsit." In *Harrison* v. *Mitford* (1): "In an action upon the case for a promise, upon non-assumpsit pleaded, a verdict was found for the plaintiff: it was moved in arrest of judgment, that the declaration was not good, the promise being for to save the plaintiff harmless, cum inde requisitus esset, and no special request laid in the declaration, as there ought to have been: the whole Court agreed clearly in this, that for this cause the declaration is not good; for as this case is, being a promise to save harmless; a special request ought to have been in the declaration, and a licet saepius requisitus will not here serve, and this verdict will no ways aid or avail the plaintiff; otherwise it would have been, if the promise had been to have paid a certain sum of money, cum inde requisitus esset, there a licet saepius requisitus: Non soluit will be good, without laying any special request, and so is the difference agreed by the whole Court; and that this declaration, for want of a special request laid, is not good, and so the rule of the Court was for the defendant." I refer also to the much later case of *Sicklemore* v. *Thistleton* (2), because it not only carries down the same principle to a much later date, but it also has a bearing upon the construction of the guarantee in the present case. The lease in that case was executed by the defendant as surety for the tenant, and the defendant covenanted, not only that the tenant would pay the rent as and when it became due, but that he, the defendant, would, if the tenant neglected to pay the same for forty days, pay the same on demand. Lord Ellenborough, in giving judgment, said: "I own that I cannot help thinking this is a qualified covenant, and that the stipulation, that 'if the lessee shall neglect to pay for forty days, the surety shall pay on demand,' which must have been introduced in ease and for the protection of the surety, does, in reasonable construction, pervade and restrain the former covenant." The other learned judges expressed themselves to the like effect. The decision of Chitty J. in *In re Brown's Estate* (3) is, in my opinion, entirely in accordance with the authorities from the earliest times. Mr. Compston has endeavoured to distinguish the present case from *In re Brown's*

(1) (1614) 2 Bulst. 229. (2) 6 M. & S. 9, 11.
(3) [1893] 2 Ch. 300.

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Estate (1) by fastening on the expression "collateral sum" as used by Chitty J. The same expression is found in some of the earliest cases. Sometimes the expression "collateral debt" is used. In my opinion these expressions merely mean a sum of money payable under some collateral agreement, or a debt created by such an agreement. In my opinion *In re Brown's Estate* (1) is good law and covers the present case.

The last point for consideration is whether there has been any such alteration in the position of the parties as releases the surety. What is relied upon is that the present plaintiffs, the Bradford Old Bank, were absorbed by the Birmingham District and Counties Bank, which subsequently became the United Counties Bank, to whom the plaintiffs early in the year 1907 assigned all their assets, including the debts due from Samuel Sutcliffe & Son. It was further contended that by the course of dealing between the two banks and Sutcliffes a novation had taken place, and that the United Counties Bank had been substituted for the Bradford Old Bank as creditors of Sutcliffes. It was said that this change of parties had discharged the surety. The case of *Wheatley* v. *Bastow* (2) is a clear authority of the Court of Appeal that a creditor may assign his debt or his securities. Turner L.J. (3) expressly holds that the position of the surety is in no respect altered by such an assignment. The assignee, he says, acquires by the assignment all the rights of the assignor, and it is difficult to see how the surety can be in a better position against the assignee than he was against the assignor. To the same effect is the decision in *In re Hallett & Co.* (4)

In *Wheatley* v. *Bastow* (2) the point was taken that the surety was placed in a different position because he had received no notice of the assignment, and it was on this ground, apparently, that the judgment in the Court below proceeded. It was assumed, I think, that the position of the surety would be improved, and not rendered worse, by the fact of his having received notice of the assignment. It certainly so appears to me. If, therefore, a surety is not discharged by the assignment of the security, and if it makes no difference to his position whether notice is or is not given to him of the assignment, I cannot see that he can be in a better position

(1) [1893] 2 Ch. 300.
(2) 7 D. M. & G. 261.
(3) 7 D. M. & G. 279.
(4) [1894] 2 Q. B. 256.

because the principal debtor has assented to the assignment, which in substance is the only difference, so far as the surety is concerned, between an assignment of the security with notice and a novation of the original debt. From this point of view it is immaterial to decide in the present case whether the evidence establishes a novation or not, though I am inclined to think that the evidence fails to establish any novation.

For the above reasons I am of opinion that the appeal fails on all points.

SCRUTTON L.J. read his judgment, which after stating the facts continued: The action came on for trial before Lawrence J., who held (1.) that, so far as Frank Sutcliffe was concerned, the guarantee ceased as a continuing guarantee on the lunacy of the surety, though the liability for debts then accrued due continued; (2.) that the accrued liability for 269*l.* 5*s.* on the current account had been satisfied by payment. This left the accrued liability for 3400*l.* on the loan account to be considered. It was pleaded (1.) that this had been discharged by the payments into the current account; (2.) that the claim was barred by the Statute of Limitations; (3.) that the surety was discharged by a novation by which the principal debtor had accepted the new bank as his creditor, being released by the old bank. The judge decided against all these contentions, and gave judgment for the Bradford Old Bank for 2954*l.* 3*s.* 9*d.* The bank did not appeal against any of the findings against them; but the committee of the lunatic appealed, urging the same three points against the claim as had been argued below.

The first point argued appears to involve a misunderstanding of the relation of loan and current accounts. The sums paid into the current account are appropriated by the customer to that account, and cannot be used by the bank in discharge of the loan account without the consent of the customer. No customer could otherwise have any security in drawing a cheque on his current account if he had a loan account greater than his credit balance on current account. The 3400*l.* debit balance on loan account cannot be treated as discharged by subsequent payments into the current account.

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Scrutton L.J.

In answer to the plea of the Statute of Limitations, the second point taken by the defendant, the learned judge held that as there were payments of interest by the principal debtor within three years of action brought the plea failed. He gave no reasons, and must have overlooked the provisions of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97). Sect. 14 of that Act expressly provides that payment by one of two co-debtors, whether bound jointly, or jointly and severally, should not deprive the other of the benefit of the statute. It seems curious that where A. is surety for repayment by B. of a loan with interest, and B. regularly pays the interest for six years so that the principal is not claimed from the surety, A. should be discharged; but the words of the statute are clear, and were so interpreted in *Cockrill* v. *Sparkes*. (1) This answer to the plea of the statute therefore fails.

But a second answer was made before the judge below to the plea, and was also argued before us. The learned judge does not refer to it, as he had decided that the first answer was good. It was that the surety was only liable on demand and that the statute therefore ran from the demand, which was within six years of action brought.

The numerous cases decided on particular facts are all reducible to one principle. When the statute of James provided that actions must be commenced within six years "next after the cause of such actions" it meant after the occurrence of all the facts which the plaintiff must prove as part of his case—that is, at the time when the plaintiff could first have brought his action and proved sufficient facts to sustain it: see per Lindley L.J. in *Reeves* v. *Butcher* (2), as explained by the Court of Appeal in *Coburn* v. *Colledge*. (3)

Was it here necessary for the plaintiff to prove a demand? Generally, a request for the payment of a debt is quite immaterial, unless the parties to the contract have stipulated it should be made: per Parke B. in *Walton* v. *Mascall*. (4) Even if the word "demand" is used in the case of a present debt, it is meaningless, and express demand is not necessary, as in the case of a promissory note payable on demand: *Norton* v. *Ellam*. (5) But it is otherwise where the debt is not present but to accrue, as in the case of a note payable

(1) 1 H. & C. 699.
(2) [1891] 2 Q. B. 509.
(3) [1897] 1 Q. B. 702.
(4) (1844) 13 M. & W. 452, 458.
(5) (1837) 2 M. & W. 461.

three months after demand: *In re Rutherford* (1); or where the debt is not a present debt, but a collateral promise: *Birks* v. *Trippet* (2) *In re Brown's Estate.* (3) The promise of a surety to pay on demand if his principal does not appears to me to be a collateral promise within the authorities; and I entertain no doubt that in this guarantee the provisions about demand are a real stipulation, and not mere words. The surety is to pay "on demand"; interest is to run from "the time of demanding payment" (clause 1); and by clause 6 the surety agrees that he is not entitled to require the creditor to accept payment until the latter has "demanded payment of such amount"; while, as the guarantee is "against loss on the realisation of debentures," the surety would need to be informed by demand of the amount he was called upon to pay. I am of opinion that the creditor must prove a real demand, and therefore that the Statute of Limitations did not run till the demand had been made. The plea of the statute therefore fails.

The third defence alleged was that the facts gave rise to a novation by which the principal debtors, Sutcliffe & Son, released the original creditor, the Bradford Bank, and undertook a new obligation to a new creditor, the United Counties Bank, whereby the surety of the original obligation was released. Novation means this: "that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be), or between different parties; the consideration mutually being the discharge of the old contract"; and, I may add, the undertaking of rights and duties by the new party: see per Lord Selborne in *Scarf* v. *Jardine.* (4) But where the suggested form of novation is that the obligation is transferred to a new creditor it is necessary to distinguish between a mere assignment and an assignment which amounts to a novation. Novation introduces a new contract and requires the assent of all parties; mere assignment transfers rights acquired under the old contract, and may be made without the assent of the debtor. Where a new debtor is accepted by the principal creditor and the old one discharged, as in the cases of changes of partnership, it is easy to see that the surety has not guaranteed that the new debtor will perform obligations and is therefore released. As

(1) (1880) 14 Ch. D. 687.
(2) 1 Wms. Saund. 32.
(3) [1893] 2 Ch. 300.
(4) (1882) 7 App. Cas. 345, 351.

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stated by the Privy Council in *Commercial Bank of Tasmania* v. *Jones* (1), the acceptance of A. as full debtor in room and stead of B., which constituted a complete novation of the debt, necessarily operated as an absolute release of B., and it was therefore in vain to contend that such novation merely amounted to a covenant not to sue the debtor, for whom the respondent was surety. The surety in that case was discharged. But, as Lord Selborne points out in *Scarf* v. *Jardine* (2), a statement that A., who is carrying on the business formerly carried on by B., will receive and pay all debts owing to or by the old firm does not necessarily, if acted upon, amount to a novation releasing B. and making A. liable. A. may be acting simply as agent or assignee of B. As assignee with notice, he can claim and receive B.'s moneys from B.'s debtors without having made a new contract with them by which B. is released and A. substituted as contracting party. That the assignment with or without notice of a guaranteed debt does not discharge the surety appears from the decision of the Court of Appeal in *Wheatley* v. *Bastow*. (3) Knight Bruce L.J. said (4): "Nor can I suggest to myself any reason for holding that the mere circumstance of assigning a debt, or a security for it, and omitting to give notice to a surety or to a person whose property is mortgaged by way of suretyship for the debt discharges the surety or the property." Turner L.J. said (5): "But the creditor enters into no contract with the surety not to assign the debt or the securities. The law gives him the right to assign them; and if he does so assign them, the obligation which attached upon the creditor attaches upon the assignee. The position of the surety is in no respect altered. The assignee, on the other hand, acquires by the assignment all the rights of the assignor, and it is difficult, I think, to see how the surety can be in a better position against the assignee than he was in against the assignor."

The facts from which it is said novation must be inferred in this case are as follows. In February, 1907, the loan account was in debit 3600*l.*, and the current account 900*l.* On Lawrence J.'s judgment the debit on the current account is immaterial, as the debit in the year of the lunacy, 1898, which was 269*l.* 5*s.*, had been

(1) [1893] A. C. 313, 316.
(2) 7 App. Cas. 351, 352.
(3) 7 D. M. & G. 261.
(4) Ibid. 276.
(5) Ibid. 279.

discharged by payments in, and no further liability existed under the guarantee. The 3400*l.* debit on the loan account in 1898 had not been reduced, but had been increased to 3600*l.* The old accounts were stopped at the figures of 3400*l.* and 900*l.* A new current account was opened by Sutcliffe & Son with the new bank on the terms, at first, that it should not be overdrawn, and then that it might be overdrawn up to 1500*l.* on the security of 1500*l.* debentures and a new guarantee from Albert Sutcliffe. If the banks had followed their regular course they would have obtained a new guarantee from the sureties to the new bank and then brought forward the old balances to an account with the new bank. Owing to Frank Sutcliffe's lunacy this course could not be followed, and matters appear to have drifted into a rather confused state. The old bank was not dissolved, but remained in existence, though as trustee for the new bank. The 6100*l.* debentures, security for the old account, were and remained in the name of the old bank, and were kept in a separate bundle of the old bank's securities in the safe of the new bank. When a debenture-holders' action to realize the securities was brought, it was brought by the old bank. The new bank continued to use the old bank's current account ledgers, and in them entered a loan account, described as "United Counties Bank as from February 13th, 1907," the date of amalgamation. There was a loan pass-book to a similar effect, but there was no evidence that Sutcliffe & Son ever saw this loan account and pass-book. They did, however, pay interest on the old loan account to the new bank by cheques on their current account and cash.

Novation requires that the old bank, the new bank, and Sutcliffe & Son should agree that all rights of the old bank as against Sutcliffe & Son should cease in consideration of Sutcliffe & Son acknowledging their indebtedness to the new bank. I can see no evidence here of an agreement that the rights of the old bank were to cease; they remained holders of the securities, though as trustees for the new bank, and successfully brought a debenture-holders' action against Sutcliffe & Son. Novation requires animus novandi, and the substitution of some other thing for the original obligation or debt: per Bacon V.-C. in *Wilson* v. *Lloyd.* (1) I can see no evidence that Sutcliffe & Son agreed to leave the old bank out of the relation, and

(1) (1873) L. R. 16 Eq. 60, 74.

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that the old bank agreed that their rights against Sutcliffe & Son should cease. All that takes place is quite consistent with an assignment of the debt by the old bank to the new bank with notice to the debtor, and it is immaterial that the old bank only retains the securities and any rights it retains as trustee for the new bank. This transaction does not, in my opinion, discharge the surety for the original debt which is assigned. This defence therefore fails, but I am not at present satisfied, though I do not wish to express a final opinion on the point, that even a novation of a creditor for the original debt would necessarily have discharged the surety.

The appeal fails and should be dismissed with costs. (1)

Appeal dismissed.

Solicitors for plaintiffs: *Blundell, Baker & Co., for Gordon, Hunter & Duncan, Bradford.*

Solicitors for defendant: *Jaques & Co., for Scholefield, Taylor & Maggs, Batley.*

(1) Some discussion took place as to the proper order as to costs, and in the result Pickford L.J. said the plaintiffs would have costs against the lunatic, and against the defendant as committee of the lunatic's estate—that is, so far as he could pay them out of the lunatic's estate—but that he was not liable personally for costs.

J. S. H.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* TWISS.

1918
Aug. 20.

Criminal Law—Charge of Gross Indecency—Evidence of Possession of Indecent Photographs of Boys—Admissibility—Adjournment of Trial—Conversation between Juryman and Witness—Effect on Trial.

On the trial of a man on a charge of committing an act of gross indecency with a male person (a boy) the prisoner pleaded not guilty, his defence being that there was no truth in the boy's statements :—

Held, upon the authority of *Thompson* v. *Rex* [1918] A. C. 221, that evidence that photographs of nude boys were found in the prisoner's lodgings was admissible for the purpose of showing what the practice of the prisoner was, just as the possession of the tools of a burglar or the apparatus of an abortionist is evidence as showing the possession of appliances and implements used by persons carrying on that particular kind of business in crime.

Rex v. *Thompson* [1917] 2 K. B. 630 explained.

Before the summing-up by the judge a juryman conversed with the boy (with whom the prisoner was alleged to have committed the indecent acts) and two other boys, all of whom had been called as witnesses by the prosecution. The juryman subsequently told the judge (to whom the incident had been reported) that the conversation had reference solely to the duration of the case and the length of a previous trial (which had been mentioned in the course of the proceedings) at which the jury before whom the case then came had disagreed. The judge accepted the juryman's explanation. A juryman also conversed with the prisoner's landlady (who was also a witness for the prosecution), but the nature of the conversation was such that it would tend to remove any bad impression the juryman might have formed of the prisoner :—

Held, that, as nothing took place which could prejudice the fair trial of the prisoner, the conviction must be upheld.

Rex v. *Ketteridge* [1915] 1 K. B. 467 distinguished.

APPEAL by the prisoner against his conviction.

The appellant was convicted on July 11, 1918, at the Chester Assizes, before Lord Coleridge J. and a jury, of committing an act of gross indecency with a male person, and was sentenced to nine months' imprisonment in the second division. There had been a previous trial at which the jury disagreed.

The male person with whom the prisoner was charged with having committed the act of gross indecency was a boy of sixteen named Marshall. Marshall gave evidence to the effect that he went by

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invitation of the prisoner to his lodgings, where on two occasions the prisoner committed the act of gross indecency with him. On the first occasion the act took place in the prisoner's sitting-room. He subsequently again visited the prisoner, when the prisoner showed him in the sitting-room some photographs of troops in khaki. The prisoner then asked him if he would like to see some more photographs which he had upstairs in the bedroom. He went upstairs into the bedroom with the prisoner, where the prisoner showed him some photographs in a frame hanging upon the wall. In the bedroom the prisoner repeated the act of gross indecency with him. The prisoner pleaded not guilty, his defence being that there was no truth in the boy's statements.

The police officer who arrested the prisoner gave evidence to the following effect in the presence of the jury: He produced a pocket wallet found in possession of the prisoner after he was arrested. The wallet contained (inter alia) sixteen photographs comprising boys in bathing costumes and a nude boy. He searched the prisoner's lodgings and found 279 photographs (produced) and four others (also produced). The four others were of nude boys. In the bedroom upstairs were some photographs of boys partly nude. He also found a powder puff and a diary (both produced).

On behalf of the prosecution it was submitted that all the photographs were admissible in evidence, whether identified by the boy as having been shown to him by the prisoner or not. On behalf of the prisoner objection was taken to any of the photographs being put in evidence except those identified by the boy as having been shown to him by the prisoner. None of the photographs objected to were shown to the jury, although they were described in the jury's presence to the extent indicated above. During the arguments which followed upon the legal objection the jury were requested by the learned judge to retire, and they accordingly withdrew to their private room. The learned judge ruled that none of the photographs were admissible in evidence except those which the boy had identified.

Upon the first day of the trial (which took place on July 10 and 11, 1918) during the adjournment for luncheon Marshall (who had given his evidence except that he had not identified any of the photographs), accompanied by two other boys, witnesses in the case (who

had completed their evidence), went into a café. Three members of the jury went into the same café. Before the adjournment the fact that there had been a previous trial of considerable length had been mentioned to the jury, and the learned judge had intimated that Marshall would be allowed to be recalled to ascertain if he could identify any of the photographs which the prosecution desired to put in. In the café one of the jurymen went to the table at which Marshall and the two other boys were sitting, and for six or eight minutes spoke to Marshall, but the other boys answered some questions. The juryman then rejoined the other two jurymen, and the three proceeded to the Court. In answer to a question by the judge, to whom the incident had been reported, the juryman admitted that he had been talking to the boys, but said that the conversation only had reference to the duration of the case, that he only asked whether the previous trial was completed in one day, that nothing else took place, and no opinion had been expressed in any shape or form. The judge accepted the juror's statement, and in reply to a question by counsel for the prosecution decided that the case ought to proceed.

During the same adjournment two of the jury went into the same hotel as a Mrs. Hawkins, with whom the prisoner had lodged, and who was a witness for the prosecution, and had given her evidence except that she was afterwards recalled and said that there was not a gramophone in the prisoner's room. One of the jurymen said to her, "What do you think of your lodger now?" To which she replied, "I have always found him a gentleman." He then said, "What do you think of the photographs?" She replied, "If the photographs had been offensive they would not have stopped long in my house."

The judge did not commence to sum up until the second day of the trial.

The prisoner appealed against his conviction upon the grounds (inter alia)—(1.) that one or more of the jurymen during the adjournment for lunch on the first day of the trial got into communication with one or more of the witnesses for the Crown; (2.) that there had been wrongful admission of evidence with reference to the photographs and the documents and articles said to have been found upon the prisoner and/or in his rooms.

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Sir Ellis Griffith K.C. and *Trevor Lloyd* for the appellant. Although the judge at the trial did not permit the photographs which had not been identified by Marshall to be given in evidence, the mischief had been done by the description of them given before the jury by the police officer, although they were not seen by the jury. The result was that secondary evidence of inadmissible evidence was given to the jury.

[AVORY J. *Thompson* v. *Rex* (1) is a direct authority against the appellant on the question whether the photographs found in his possession were admissible in evidence.]

In *Thompson* v. *Rex* (1) there was no dispute that some person had committed the indecent acts; the only question was whether the prisoner was the guilty person. That a prisoner has a propensity to commit a particular crime is only admissible in evidence where the question in issue is solely one of identity of the prisoner. The photographs, at the most, show nothing more than that the prisoner had a propensity or disposition to commit the crime. Evidence of the prisoner's general habits is not admissible.

[DARLING J. The Court is against you on that point. It thinks Lord Coleridge J. was too favourable to the appellant in excluding the photographs.]

As to the conversations between the jurymen and the witnesses, it is true that the fact that there had been a previous trial had been mentioned to the jury, so that the juryman who talked to the boys was not prejudiced by the part of the conversation about the previous trial, but the principle laid down in *Rex* v. *Ketteridge* (2) that "if a juror after the judge has summed up in a criminal trial . . . . converses . . . . with other persons, it . . . . renders . . . . the whole proceedings abortive," applies, whether the conversation takes place before or after the summing-up: see also *Reg.* v. *Ward.* (3) By one of their number talking to the boys the jury had an opportunity they ought not to have had of forming an opinion as to the character of the boys. Although the juror's explanation was that he only asked the time the previous trial lasted, it is very difficult in a case of this kind to accept the statement of the juror as to the details of the conversation. The rule laid down in *Rex* v.

(1) [1918] A. C. 221. (2) [1915] 1 K. B. 467.
(3) (1867) 10 Cox, C. C. 573.

Ketteridge (1), that if a juror separates from his colleagues and not being under the control of the Court converses with other persons the whole proceedings are abortive, is universal and inflexible.

Artemus Jones and *Ralph Sutton* for the prosecution were not called on.

The judgment of the COURT (Darling, Avory, and Lush JJ.) was delivered by

DARLING J. This is an appeal by the prisoner against his conviction upon several grounds. He complains that evidence was wrongly admitted at the trial by my brother Coleridge in that a police officer described some photographs as being photographs of nude boys. These photographs were not admitted by the learned judge, who expressed the opinion that they were not evidence. Therefore, if any evidence was wrongly admitted it was secondary evidence of photographs which were not themselves before the Court. Even if we took the view that what was said by the police officer was not evidence, it would not vitiate the trial. We should use the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, which this Court often applies where there has been some technical slip, as we are convinced that there has been no substantial miscarriage of justice. But it is not necessary to do that, because we are of opinion that the photographs which the police officer compendiously described as being photographs of nude boys would have been admissible in evidence if they had been tendered by the prosecution, and if they had been put in evidence they would have done the appellant far more harm than the mere description which the police officer gave of them. It is not necessary to give a long disquisition as to why they would have been admissible in evidence, because it is sufficient to say that in our opinion it appears from *Thompson* v. *Rex* (2) that they would have been admissible. In *Thompson* v. *Rex* (2) it was held that photographs, a powder puff, cosmetics, and things of that kind are admissible in evidence, they being in the possession of a person accused of this offence, although the defence in that case was an alibi. The defendant disputed his identity, and it was held in the Court of Criminal Appeal (3) (I think

(1) [1915] 1 K. B. 467. (2) [1918] A. C. 221.
(3) [1917] 2 K. B. 630.

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there has been a misconception as to the meaning of the judgment) that where the only defence was an alibi the photographs were admissible in evidence. A fortiori it would seem from the reasoning of the learned Lord Chief Justice, who delivered the judgment of the Court, that in the present case the photographs would have been admissible in evidence. It is also clear from the judgments in the House of Lords in *Thompson* v. *Rex* (1), where the decision of the Court of Criminal Appeal (2) was affirmed, that the true meaning of that decision is that not only in a case where the defence was as to identity were the photographs evidence, but that they are also admissible where, as in the present case, all the facts are in dispute for the purpose of showing what the practice of the accused who had the materials about him is, just as possession of the tools of a burglar or the apparatus of an abortionist is evidence as showing the possession of appliances and implements used by people carrying on that particular kind of business in crime.

As regards the conduct of one or possibly more of the jury in the course of the trial, formerly in charges of felony the jury were not allowed to separate. But the tendency of the Legislature has been to trust jurymen more and to relax the old rule with regard to them. The Juries Detention Act, 1897 (60 & 61 Vict. c. 18), allows the Court to permit jurymen to separate in cases of felony, except on a charge of murder, treason, or treason felony. Can it be supposed that when the Legislature passed that statute it thought that jurymen, when they leave the Court (the case being part heard) and go to luncheon, never mention the case to any one? They go to some place to obtain refreshment, and it would be absurd to think or suppose that jurymen do not speak to any one they meet out of Court, and that they make allusions about the case solely to one another and not to anybody else. An assize town must be full of their acquaintances and of curious people, and the Legislature has deliberately allowed them to separate and go out in cases of felony, treason, and treason felony, although in the whole course of English history down to 1897 they had been kept locked up. *Rex* v. *Ketteridge* (3) was a different case from the present one. It was a case where, after the judge had summed up, one of the jurymen got

(1) [1918] A. C. 221. (2) [1917] 2 K. B. 630.
(3) [1915] 1 K. B. 467.

away from the others and went out into the town instead of doing that which it was his bounden duty to do, namely, to discuss the case with his fellow-jurors. He separated himself from them and made it impossible for any verdict to be given until he had been found, brought back, and had discussed the conclusion at which the jury ought to arrive. In giving judgment Lush J. said (1): "If a juror, after the judge has summed up, in any criminal trial separates himself from his colleagues and, not being under the control of the Court, converses or is in a position to converse with other persons, it is an irregularity which, in the opinion of the Court, renders the whole proceedings abortive, and the only course open to the Court is to discharge the jury and commence the proceedings afresh." I and my brother Atkin were members of that Court, and the judgment delivered by my brother Lush was the considered and written judgment of the Court, and this Court abides by it. It is to be observed that there was there an absolute breach of the whole procedure laid down as governing the conduct of the Court at the time of and after the summing-up, because a bailiff is sworn to keep the jury together and to take care that they do not converse with anybody, except each other, and that they make no communication to any one except to one another. The whole solemn procedure of the Court had been violated in that case; whereas in the present case the trial was proceeded with and the juryman did that which we know, and the Legislature knows, jurymen must constantly do, namely, he left the precincts of the Court to go where he could talk to other people.

In those circumstances it is necessary for us to consider whether what the juryman did was of such a character as to lead us to think that there may have been an injustice done to the prisoner. It is not enough that he spoke to some one, and that the person to whom he spoke was a witness, although it makes it necessary to consider the matter more carefully if the person to whom he spoke was a witness; and I hope that nothing decided in this Court to-day will incline anybody to think that we hold it to be a laudable practice for jurymen to go out and talk to other persons. They had much better keep their own counsel and not speak to anybody else. If they speak to anybody else about the case, they certainly ought not

(1) [1915] 1 K. B. 470.

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to speak to a witness, because if they do, their conduct may be open to grave suspicion. As to the conversation with the boys, the Court has no information upon oath as to what was said. The matter was mentioned to Lord Coleridge J., who accepted the explanation given by the juryman that all that was said was that he asked one of the boy witnesses how long the case was likely to last, as it had been mentioned that the case had previously lasted a long time, when the jury disagreed. As to the conversation with Mrs. Hawkins, she was either talking of the photographs in the frame—if so her description of them would be immaterial because the juryman saw them—or if she referred to the others and the juryman thought they were offensive photographs from what the policeman said, he only received from her information that they were not offensive. She only gave him the information that if they had been offensive they would not have stopped long in her house. If the juryman had formed a bad impression of the appellant, what she said would tend to remove it, because all she said was, "I always found him a gentleman." Therefore there was nothing which in our opinion could prejudice the case of the appellant.

We desire to add, as emphatically as we can, that, although jurymen are allowed to go about while the trial is proceeding and cannot be prevented from doing so, and although they are allowed to go home and a case may last several days, nothing we have said is to be taken as encouraging them to discuss the evidence given at the trial. They should talk of other topics, discussing the trial with the other jurymen only until it comes to a close. In the present case nothing was done to prejudice the fair trial to which the appellant was entitled. The appeal will therefore be dismissed.

Appeal dismissed.

Solicitor for appellant: *W. Pingree Ellen, for J. G. Lawrence, Liverpool.*

Solicitor for prosecution: *G. Livsey, Wallasey.*

J. E. A.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* HOLMEN.

1918
Aug. 21.

Criminal Law—Practice—Committal for Trial to Quarter Sessions—Disagreement of Jury—Transmission of Indictment to Assizes—Appropriate Court for Presentment of fresh Indictment—Additional Counts founded on Evidence in Depositions—Grand Juries (Suspension) Act, 1917 (7 & 8 *Geo.* 5, *c.* 4), *s.* 1, *sub-ss.* 2, 6.

By s. 1, sub-s. 2, of the Grand Juries (Suspension) Act, 1917, an indictment may be presented in the appropriate Court without having been found by a grand jury against a person who has been committed for trial, and that Court may authorize the addition of other counts to the indictment if, in the opinion of the Court, they are founded on evidence disclosed in any deposition taken before the committing justice of the peace.

By sub-s. 6, "The expression 'appropriate Court' means the Court to which the accused is committed for trial (that is to say, the Court specified in the recognizance entered into by the prosecutor or witnesses before the committing justices) . . . ."

A prisoner was committed for trial to quarter sessions upon an indictment containing fifteen counts, of which four were for embezzlement, four for stealing cheques, and the remaining seven for stealing various sums of money. The four counts for embezzlement were withdrawn, and by direction of the recorder the jury acquitted the prisoner upon the four counts for stealing cheques. They also acquitted him upon the evidence upon one of the seven counts for larceny of money and disagreed as to the remaining six counts. The recorder thereupon transmitted the indictment to the assizes in order that the prisoner might be tried on the counts upon which the jury had disagreed. At the assizes an indictment containing twelve counts was presented, of which six were for larceny of the various sums of money, as to which the jury had disagreed at quarter sessions, and six additional counts were for misappropriation of the same sums of money entrusted to the prisoner for a particular purpose, the additional counts being founded on evidence disclosed in the depositions taken before the committing justice of the peace. The preliminary objection was taken that the recorder having tried the case at quarter sessions had no jurisdiction to transmit the indictment to the assizes, but the judge overruled the objection, and held that the addition of the six counts did not alter the position :—

Held, that the recorder, although he had embarked on the inquiry, had power to transmit the indictment to the assizes; that the assize Court became for all purposes "the appropriate Court" within the meaning of s. 1, sub-s. 6, of the Grand Juries (Suspension)

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Act, 1917; and that therefore the fresh indictment containing the additional counts, founded on facts disclosed in the depositions, was properly presented in that Court.

APPEAL by the prisoner Holmen against his conviction.

The prisoner was charged at the city of Cardiff Quarter Sessions upon an indictment containing fifteen counts, of which four counts contained charges of embezzlement, four contained charges of stealing valuable securities, to wit cheques, and the remaining seven contained charges of larceny of various sums of money aggregating 2210*l.*

At the trial, which took place on July 13, 1918, the four counts for embezzlement were withdrawn, and by the direction of the recorder the jury acquitted the prisoner on the four counts for stealing valuable securities. They also, upon the evidence, acquitted him upon one of the seven counts for larceny of money, namely, a count for stealing 400*l.*, and disagreed as to the remaining six counts. The recorder thereupon transmitted the indictment to the Glamorganshire Summer Assizes in order that the prisoner might be tried on the counts upon which the jury had disagreed. At the assizes an indictment containing twelve counts was presented against the prisoner, of which six were for larceny of various sums of money aggregating 1810*l.* (i.e. those sums of money as to which the jury had disagreed at the Cardiff Quarter Sessions), and six additional counts were for the misappropriation of the same sums of money entrusted to him for a particular purpose. At the trial at the assizes, before Lord Coleridge J., the preliminary objection was taken on behalf of the prisoner that the recorder having tried the case had no jurisdiction to exercise a discretion to transmit the indictment to the assizes. The learned judge, after conferring with Bray J., held that the recorder could exercise a discretion at the close of the case to remit it to the assizes and that the addition of the six counts did not alter the position. The additional counts were founded on evidence disclosed in the depositions taken before the justice of the peace on April 23, 1918, who committed the prisoner to the Cardiff Quarter Sessions for trial. The trial at the assizes took place on July 19, 1918, when the jury found the prisoner guilty, and he was sentenced to twelve months' imprisonment in the second division.

The prisoner appealed against his conviction.

Lincoln Reed for the appellant. As the recorder entered upon the trial of the appellant at quarter sessions and the appellant was acquitted upon certain counts of the indictment and the jury disagreed upon other counts, the recorder had no power to transmit the indictment to the assizes. By entering on the trial the recorder exercised and exhausted his discretion as to whether or not he would try the indictment. Immediately he embarked on the trial his power to transmit the indictment to the assizes was gone. At the assizes the appellant was tried on six counts forming part of the indictment at quarter sessions and six new counts.

[AVORY J. The Court is of opinion that at the assizes he was tried on a new indictment.]

The new indictment was a nullity. The effect of s. 1, sub-ss. 2 and 6, of the Grand Juries (Suspension) Act, 1917 (1), is that an indictment can only be presented against an accused person in the Court to which he has been committed for trial, and new counts can only be added by the judge of that Court. At the assizes no application was made to the judge for his consent to the presentment of the indictment. As the appellant was committed for trial to the Court of quarter sessions, that Court alone could try the indictment or authorize the addition of any counts.

[AVORY J. As soon as the Court of quarter sessions remitted the indictment to the assizes, did not the assize Court become the "appropriate Court" within the meaning of the Grand Juries (Suspension) Act, 1917 ?]

A Court cannot be the "appropriate Court" unless the accused is committed for trial to that Court. There was no committal for trial to the assizes by the Court of quarter sessions, and after the recorder had remitted the indictment to the assizes the assize Court could not be treated as the Court to which the prisoner was committed for trial, because it was not the Court at which the witnesses were bound by recognizance to attend. That Court was the Court of quarter sessions. The committal can alone be looked at for the purpose of ascertaining the Court to which the accused is committed for trial.

Roland Oliver for the prosecution. The crimes with which the prisoner was charged were not within the Vexatious Indictments

(1) See note on p. 865, post.

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Act, 1859. Therefore a bill of indictment could, apart from the Grand Juries (Suspension) Act, 1917, have been voluntarily preferred before a grand jury against the appellant at the assizes. A main object of the Act of 1917 was to secure that, in the absence of grand juries, no person should be tried without being committed for trial. In the appellant's case this condition was fulfilled, and there was therefore nothing to prevent the presentation of the new indictment against him at the assizes. The Act of 1917 formed part of emergency legislation and was passed in consequence of the military demands upon the male population. It was not intended, provided the person accused had been committed for trial, to prevent the presentation of an indictment in a case in which before the Act an indictment could have been presented.

Lincoln Reed replied.

The judgment of the COURT (Avory, Lush, and Roche JJ.) was delivered by

AVORY J. The appellant was tried at the assizes upon an indictment presented at the assize Court. Before the presentation of that indictment he had been placed upon his trial at the city of Cardiff Quarter Sessions upon an indictment containing charges upon which he was ultimately convicted at the assizes. At quarter sessions certain counts were withdrawn, the appellant was, by direction of the recorder, acquitted on other counts because they could not be supported in law, and as to another count the jury acquitted the appellant on the facts. They failed to agree on the remaining six counts. Those remaining counts consisted of charges of larceny of proceeds of cheques, and it is upon those charges of larceny that the prisoner was ultimately convicted at the assizes. The recorder, when the jury disagreed on the charges of larceny, remitted the case to the assizes. He had ample power to do that.

On behalf of the appellant it is contended that the recorder, having embarked on the inquiry, had no jurisdiction to remit the indictment to the assizes. This power exists under the commission of the peace, and is to be exercised in any case in which the Court of quarter sessions is of opinion that the case is more fit to be tried at the assizes than at quarter sessions. It is obvious that it may become more apparent after than before a case has been embarked

on that it is fit to be tried at the assizes. We therefore think that the recorder had power to remit the case to the assizes and that that power was properly exercised. It then became for all purposes an assize case.

It was further contended on behalf of the appellant that there was no power under the Grand Juries (Suspension) Act, 1917, to present the indictment at the assizes because the Act only gives power to present the indictment in the appropriate Court, i.e. the Court specified in the recognizances taken before the committing justices. But, as the recorder properly remitted the indictment to the assizes, the assize Court became for all purposes the appropriate Court within the meaning of s. 1, sub-s. 6, of the Grand Juries (Suspension) Act, 1917. It was the appropriate Court because the Court of quarter sessions decided that it was. There was therefore power to present the fresh indictment in that Court containing the additional counts, which were founded on facts disclosed in the depositions and sanctioned by the assize Court. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitor for appellant: *H. M. Lloyd, Cardiff.*
Solicitor for prosecution: *Director of Public Prosecutions.*

NOTE.—Grand Juries (Suspension) Act, 1917 (7 & 8 Geo. 5, c. 4), s. 1, sub-s. 2: "In any case where a person has been committed for trial, or where the consent or direction in writing of a judge of the High Court . . . . for the presentment of an indictment against any person has been given, but in no other case, an indictment against that person may be presented in the appropriate Court without having been found by a grand jury, but in other respects as heretofore; and where an indictment is so presented it shall be proceeded with in like manner as if a true bill had been found and presented in the Court by a grand jury, and the statute and common law relating to such proceedings shall apply accordingly:

"Provided that where an indictment is so authorised to be presented in any Court it shall be lawful for that Court to authorise the addition of other counts to the indictment or the presentment in the Court of any further indictment against the same person, if such counts or indictment are in the opinion of that Court founded on facts or evidence disclosed in any examination or deposition taken before a justice of the peace in the presence of the accused."

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Sub-s. 6: "For the purpose of this section the expression 'appropriate Court' means the Court to which the accused is committed for trial (that is to say, the Court specified in the recognizance entered into by the prosecutor or witnesses before the committing justices) or which is specified in the consent or direction given by a judge of the High Court . . . ."

Sect. 2, sub-s. 4: "This Act shall remain in force only during the continuance of the present war and for a period of six months after the termination thereof."

J. E. A.

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Aug. 22.

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Ex parte DIRECTOR OF PUBLIC PROSECUTIONS.

Emergency Legislation—Offence against Defence of the Realm Regulations—Police Report—Certificate of Competent Military Authority—Defence of the Realm Regulations, regs. 45 (1.) (*ccc*), 56 (3.).

By reg. 45 (1.) (*a*) of the Defence of the Realm Regulations, to forge any naval, military, air force, police or official pass, permit, certificate, licence, or other document, or any passport is made an offence against the regulations.

By reg. 45 (1.) (*ccc*), "If any person uses or has in his possession without lawful authority or excuse any form which has at any time been prepared by or under the direction of any Government Department or the Government of any of His Majesty's Dominions or any foreign Government for the purpose of being when completed issued as such pass, permit, certificate, licence, or other document, or passport, or has in his possession without lawful authority or excuse any paper or other document so nearly resembling any such form as to be calculated to deceive . . . ." he shall be guilty of an offence against the regulations.

By reg. 56 (3.), "Where a person is alleged to be guilty of an offence other than an offence declared by these regulations to be a summary offence, the case shall be referred to the competent . . . . military authority who shall forthwith investigate the case and determine whether or not the case is to be proceeded with, and" if so "whether or not" the offence is of such a character that it "can adequately be dealt with by a Court of summary jurisdiction."

By reg. 56 (5.), "If it is determined that the case is to be proceeded with, but that the offence is of such a character as aforesaid, the offender may . . . . be tried by a Court of summary jurisdiction and not otherwise."

A police officer, in consequence of an interview with the defendant, a Russian, at which he (the defendant) produced a document

purporting to be his Russian birth certificate, reported to the police authorities that the defendant appeared to have infringed reg. 45 (1.) (*ccc*) in having in his possession a forged document so nearly resembling a certificate issued by a foreign Government as to be calculated to deceive, and the case was referred to the competent military authority in accordance with reg. 56 (3.). The competent military authority gave a certificate that he had investigated the case and had determined that it was to be proceeded with and was of such a character that it could adequately be dealt with by a Court of summary jurisdiction. The defendant was thereupon arrested by the police, and at the police station a charge was entered against him on the charge-sheet of "having in his possession without lawful authority or excuse a document so nearly resembling a certificate issued by a foreign Government as to be calculated to deceive, against reg. 45 (1.) (*ccc*) of the Defence of the Realm Regulations." At the police court the certificate of the competent military authority was produced by the police officer and the charge entered on the charge-sheet was read out, but the magistrate refused to proceed with the case upon the ground that numerous offences were mentioned in reg. 45 (1.) (*ccc*), but no offence was strictly defined in the certificate. A rule nisi for an order to the magistrate to hear and determine the case having been obtained :—

Held, that the rule must be made absolute, inasmuch as, although reg. 45 (1.) (*ccc*) defined several offences, the magistrate was under no misapprehension as to the particular branch of it under which the charge against the defendant was made, because he had the charge-sheet before him, and, if he had any doubt, he might have asked the police officer whether the charge in the charge-sheet was for the same offence as that which the competent military authority had investigated.

RULE NISI obtained on the application of the Director of Public Prosecutions calling upon the respondent Mr. Mead, a metropolitan magistrate, and the defendant Davis Fox to show cause why he (the respondent) should not hear and determine, pursuant to the statutes in that behalf, a charge against the defendant under reg. 45 (1.) (*ccc*) of the Defence of the Realm Regulations (1) on the ground that the certificate of the competent military authority under reg. 56 (3.), relating to the defendant, was good and sufficient in law, and gave to the respondent full jurisdiction to deal with the defendant on charges under reg. 45 (1.) (*ccc*) which he might upon the evidence adduced be shown to have committed.

The charge against the defendant was under reg. 45 (1.) (*ccc*) of

(1) See note on p. 878, post.

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having in his possession on May 23, 1918, without lawful authority or excuse a document so nearly resembling a certificate issued by a foreign Government as to be calculated to deceive.

On May 23, 1918, a police officer had an interview with the defendant, a Russian, at which he (the defendant) produced a document which purported to be his Russian birth certificate. As a result of inquiries the officer on June 25, 1918, submitted a report to Scotland Yard pointing out that the defendant appeared to have infringed reg. 45 (1.) (*ccc*) of the Defence of the Realm Regulations in having in his possession a forged document so nearly resembling a certificate issued by a foreign Government as to be calculated to deceive, and suggested that the report and certain other material documents should be forwarded to the competent military authority in order that he might consider the advisability of a prosecution being instituted against the defendant for the offence. At Scotland Yard the suggestion and recommendation were approved of, and the papers were forwarded to the competent military authority. The case was referred to the competent military authority in accordance with the terms of reg. 56 (3.) " to investigate the case and determine whether or not . . . . it is an offence of such a character that it can adequately be dealt with by a Court of summary jurisdiction." On July 10, 1918, the papers were returned, with the competent military authority's written authority directing that the defendant was to be charged before a Court of summary jurisdiction. The instructions were to charge him under reg. 45 (1.) (*ccc*), as had been suggested in the officer's report. The competent military authority gave his written authority in the form of the following certificate: " Re Davis Fox.—Alleged offence against regulation 45 (1.) (*ccc*) of the Defence of the Realm Regulations. I, Major G. C. Peevor, D.A.A.G. (D.R.R.), London district, a competent military authority, hereby certify that I have investigated the above case and have determined that it is to be proceeded with, and have further determined that it is an offence of such a character that it can adequately be dealt with by a Court of summary jurisdiction." On July 19, 1918, police officers saw the defendant and told him they were going to arrest him for having in his possession a forged birth certificate. He was thereupon arrested and taken to Vine Street Police Station, where a charge was entered against him on the charge-sheet of

"having in his possession on May 23, 1918, at Vine Street, W., without lawful authority or excuse a document so nearly resembling a certificate issued by a foreign Government as to be calculated to deceive, against reg. 45 (1.) (*ccc*) of the Defence of the Realm Regulations." On July 20, 1918, the defendant was taken to Marlborough Street Police Court and placed in the dock before the respondent. The police officer produced to the respondent the certificate of the military authority, and the charge entered on the charge-sheet was read out. The respondent thereupon said that he took exception to the form of the certificate, which did not define the offence for which the prosecution was to be commenced. He pointed out that numerous offences were mentioned in reg. 45 (1.) (*ccc*), and added that as none of them was strictly defined in the certificate he could not proceed with the case, and he thereupon adjourned it until July 27. On July 27 it was further adjourned till August 7.

In an exactly similar case which had previously been before the respondent the representative of the competent military authority pointed out to the respondent that in the London district it might be possible to comply with his wishes, but that it certainly could not be done by other competent military authorities all over the country; that in the London district the competent military authority had a certain modicum of legal knowledge which was not available to all competent military authorities; and that he (the representative of the competent military authority) did not think it was the wish of the authority to give a certificate in any other form than that in which it had been given.

On August 7 the respondent refused to hear the case on the certificate of the competent military authority as it stood, and discharged the defendant. The rule nisi was then obtained.

In an affidavit made by him in opposition to the rule the respondent said that all he was contending for was "that there should be simply a precaution that the case considered by the" competent military "authority should be identical with that placed before the Court. Whether that should be by formulating the charge in the ordinary way or by making the police report an exhibit to the certificate might be left to the discretion of the competent military authority."

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Giveen (*Branson* with him) for the respondent, the magistrate, showed cause. The procedure under the Defence of the Realm Regulations is of a special nature. Reg. 56 (1.) shows that an offence against the regulations may, unless otherwise provided, be tried by a court-martial, a jury, or a Court of summary jurisdiction. The offence with which the prisoner was charged by the police is not declared by the regulations to be a summary offence, and therefore is not within reg. 56 (2.), under which it could be tried by a Court of summary jurisdiction. By reg. 56 (3.) the case, not being declared by the regulations to be a summary offence, is to be referred to the competent military authority, and when it is so referred there are three ways of dealing with it. Except when the case is sent by the competent military authority to a civil Court that Court has no jurisdiction to deal with it. By reg. 56 (4.) power is given to the competent military authority to decide whether the case is to be proceeded with or not, and only if the authority decides that it is to be proceeded with and that it is to go to a Court of summary jurisdiction can that procedure be adopted. There is no general regulation determining what offences other than those declared to be summary offences are to be tried by a Court of summary jurisdiction. The regulations obviously contemplate that the competent military authority shall give careful consideration to a case in order to determine whether it is to be proceeded with. As a court-martial can inflict the penalty of death, the competent military authority must have been regarded by the Legislature as having the skill to consider cases of the highest importance. The view taken by the respondent that he had jurisdiction to deal with the case only if he was satisfied that the charge upon which he was asked to adjudicate was the same as that which had been investigated by the competent military authority was right. He gave the applicant the opportunity of calling any evidence he chose upon the point. If the police report had been annexed to the certificate of the competent military authority it would have been sufficient. The competent military authority delegated to the police the power to make the charge. Unless the respondent had some evidence, it was impossible for him to know whether the police were making a charge other than that which the competent military authority had been asked to investigate.

[AVORY J. Why did not the respondent ask the police officer

whether the charge entered on the charge-sheet was made in pursuance of the certificate of the competent military authority ?]

If the police officer had produced the communications between the police authorities and the competent military authority the respondent would have proceeded with the case. In *Jones* v. *Wilson* (1) stress was laid on the importance of a specific authority being proved. Mandamus is not the proper remedy, inasmuch as the respondent did not decline to exercise jurisdiction in the sense that he refused to entertain the case. It is quite consistent with the documents before the respondent that the charge investigated by the competent military authority might have been one of the defendant's having in his possession a document not a forged birth certificate and not a document issued by the Russian Government. The question before the Court is purely one as to the production of evidence. The application for a rule in the nature of a mandamus is therefore misconceived.

Hawkin for the defendant. Sect. 1, sub-s. 4, of the Defence of the Realm Consolidation Act, 1914 (5 & 6 Geo. 5, c. 8), provides that for the purpose of the trial of a person for an offence against the regulations by court-martial and the punishment thereof, the person may be proceeded against and dealt with as if he were subject to military law and had on active service committed an offence under s. 5 of the Army Act (44 & 45 Vict. c. 58). A court-martial can inflict very serious sentences for offences against that section. The procedure must therefore be strictly observed.

[AVORY J. Reg. 56 does not require the competent military authority to investigate the case in the same way as an offence is dealt with under the Army Act.]

There is no evidence that the birth certificate alleged to be forged ever went before the competent military authority. [Sects. 45, sub-s. 5, and 21, sub-s. 2, of the Army Act; the King's Regulations, 1912; and the Rules of Procedure as to framing charges under the Army Act (rr. 9 to 15) were also referred to.]

Sir A. Bodkin for the applicant the Director of Public Prosecutions in support of the rule was only called upon to argue the point whether upon the materials before the magistrate he had jurisdiction to adjudicate upon the case. Reg. 58c of the Defence of the Realm

(1) [1918] 2 K. B. 36.

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Regulations shows that the certificate of the competent military authority proves itself. The certificate is prima facie evidence that an offence has been committed under reg. 45 (1.) (*ccc*) and limits the charges that can be made against the defendant to those mentioned in that regulation. The certificate itself limits the nature of the charges that can be made. The difficulty arises from reg. 45 (1.) (*ccc*) mentioning different kinds of documents. The effect of the competent military authority having investigated an offence under that regulation is that a prosecution for such an offence as is within the regulation is authorized. The certificate refers to an alleged offence under a specific regulation. The differences between the offences which are within the regulation are of the slightest possible character, and the competent military authority in effect says by the certificate that the character of the offence is such that it can be dealt with by a Court of summary jurisdiction. The respondent had also before him the charge-sheet which was read out to the prisoner. The certificate ought to be read reasonably and distributively. The competent military authority leaves it to the police who have control of the document to formulate the particular charge. The object of introducing the competent military authority is that he should determine the Court for trial. The point which now appears from the respondent's affidavit to have been in his mind was not appreciated when the case was before him and the prosecution is prepared to satisfy the respondent by evidence that the charge before him is that which was investigated by the competent military authority. The police officer shall have instructions to give evidence that the charge before the respondent is the same as that which he reported.

DARLING J. In my opinion the rule should be made absolute. By reg. 56 (1.) of the Defence of the Realm Regulations, "Except as otherwise provided by this regulation, a person alleged to be guilty of an offence against these regulations may be tried either by court-martial, or by a civil Court with a jury, or by a Court of summary jurisdiction." On behalf of the defendant Mr. Hawkin has contended that the competent military authority was to investigate the case in a particular manner laid down in various statutes. In my judgment he was not bound so to investigate it. He was to

investigate it so far as was necessary to determine whether it was advisable to proceed with the case, and if he came to the conclusion that it was, then to further investigate it sufficiently to enable him to judge whether it should be tried by court-martial or by a civil Court with a jury, or was so trivial a case that it might properly be sent to a Court of summary jurisdiction to be dealt with. He decided that the case did not require a court-martial or a trial by jury, but could properly be dealt with by a Court of summary jurisdiction, and thereupon the matter was laid before the police authorities, who, acting under proper instructions, took the case before the respondent, the magistrate. When the case came before him the police produced the accused, a certificate from the competent military authority, and the charge-sheet, and the charge was read over in the ordinary manner.

The respondent at that time knew what the charge was, because he had the charge-sheet before him. The police officer handed him the certificate of the competent military authority. It is perfectly true that reg. 45 (1.) (*ccc*) defines several offences, but the respondent was under no misapprehension as to the particular branch of it under which the charge against the defendant was formulated, because he had the charge-sheet in front of him.

The respondent at once said that he took exception to the form of the certificate, which did not define the offence for which the prosecution was to be commenced, and that he could not proceed with the case. In my judgment, the respondent by taking up that position declined to exercise his jurisdiction, and, provided the facts are established, an order to hear and determine is the proper remedy.

The position taken up by the respondent was that the certificate ought to formulate the exact offence, just as an information or summons or a count in an indictment formulates the particular offence for which a person is to be tried, and this certificate clearly did not do that. In his affidavit the respondent has since said that he would have been satisfied with a report of the competent military authority, or with any evidence which would have shown him what case the military authority had investigated. But the competent military authority had in substance told him that he had investigated a charge

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under reg. 45 (1.) (*ccc*) and that the charge upon which he had remitted the prisoner to him that he might deal with it was that which he had before him on the charge-sheet. I cannot see that any kind of injustice could possibly have been done to the defendant. The suggestion is that the authorities might have investigated one charge and the defendant might have been charged before him with another offence. If there was any real danger of that having been so the respondent could have satisfied himself by putting a very simple question to the police officer, who would have been bound to answer it and would have been under the responsibility of an oath. The question he could have asked the police officer is, "Is the charge on the charge-sheet the same as that which you laid before the competent military authority and which he investigated?" The respondent did not do that, but took what seems to me to be a purely technical and pedantic objection to the form of the certificate. It is quite plain that, irrespective of the merits of the case, the respondent's view is that the certificate must itself formulate a charge so that he may judge from the certificate and the charge before him that the charge which is then being proceeded with is the same as that which was investigated by the competent military authority. In my judgment there was no need for more than was before the respondent in order to entitle him, and to make it his duty, to proceed with the hearing of the case. If he had asked the question I have indicated and had not been satisfied by the prosecution that the same charge had been investigated by the competent military authority as the charge upon which the defendant then stood before him, he could properly have said, "I shall not proceed with the case." The military authorities, however, do not claim to put the respondent in the position of not knowing whether the charge which has been investigated and remitted to him is the same as that upon which the defendant stands before him. If that claim were made, I think the respondent would have a right to resist it. But the respondent's claim was that the certificate must state on the face of it that the precise charge stated in the charge-sheet was that upon which the case came before the competent military authority. The competent military authority has given the reason why the certificate was not drawn in that form, namely, that, not being lawyers, the authorities might make a mistake in drawing up some-

thing analogous to a count or an indictment. That great care would have to be taken in drawing up a certificate of that kind is plain from the meticulous objections to the form of the certificate in the present case which Mr. Hawkin has taken on behalf of the defendant. If the magistrate has any genuine doubt as to what case has been remitted to him, or whether it is the same as that on which the defendant is charged, the military authorities must supply the necessary information, and I have not the slightest doubt that they would have done so in the present case if they had been asked. The rule will be made absolute, but in the circumstances —as the respondent believed he was indicating the proper course to be pursued by the competent military authority—without costs.

AVORY J. I agree that the rule should be made absolute. I also agree with the contention of Mr. Giveen on behalf of the respondent that the respondent had no jurisdiction over the offence charged in the charge-sheet unless the provisions of reg. 56 had been complied with. It is a clear and well-established rule of law that no new offence is cognizable by a Court of summary jurisdiction unless it is expressly made so by statute, and it is only by compliance with the provisions of reg. 56 that the offence with which the defendant was charged becomes so cognizable. The question is—and I think it is the question which the respondent intended to raise—whether the certificate in the present case was sufficient prima facie evidence that the provisions of reg. 56 had been complied with. If it was the magistrate had jurisdiction and ought to have entered upon the inquiry. It may well be that a document may be sufficient prima facie evidence, but it may be open to the other party to rebut it by showing that in fact the provisions of the regulation have not been complied with, and if in any case it can be shown by the defendant that he is in fact charged before the magistrate with an offence which has not been investigated by the competent military authority he would immediately oust the jurisdiction of the magistrate. In my opinion the certificate in the present case was prima facie evidence that the provisions of reg. 56 had been complied with. It follows literally the words of the regulation which provide that when the competent military authority has investigated the case and

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determined that it is to be proceeded with and can be adequately dealt with by a Court of summary jurisdiction it shall be so proceeded with before a Court of summary jurisdiction. The competent military authority says in his certificate that he has investigated "the above case." "The above case" was that of the defendant, who was charged with an offence against reg. 45 (1.) (*ccc*) of the Defence of the Realm Regulations.

In my opinion that statement gave the respondent jurisdiction to investigate any charge that was made against the defendant of having committed an offence against reg. 45 (1.) (*ccc*) and therefore gave him jurisdiction to investigate the charge which appeared on the charge-sheet. The charge-sheet alleged that the offence had been committed on May 23, 1918. The date may be quite immaterial in the present case, because if the defendant had the document in his possession on May 23 he probably had it in his possession on several other days. In a case where the date is material, if it appears by evidence tendered by an accused person that he is charged with an offence on a particular day which has never been investigated by the competent military authority, the magistrate's jurisdiction would immediately be ousted. But nothing of that kind occurred in the present case. It was not suggested by any evidence or argument for the defendant that he was charged on the charge-sheet with an offence which had never been investigated by the competent military authority. It is to be regretted that when the respondent took the objection to the form of the certificate it did not occur to any one to ask the police officer the simple question whether the charge in the charge-sheet was the same as that which had been investigated by the competent military authority. I can quite understand why that did not occur at the time to counsel appearing for the competent military authority, because it is quite clear that the respondent's objection was to the form of the certificate, and he conveyed the impression that, whatever evidence were offered to him, he would still hold that he had no jurisdiction unless the certificate were in some amended form. That impression no doubt led to the slight error—the unfortunate error—of not putting that simple question, and for the future, if it is not convenient to the military authorities to make their certificate more specific, it would be better that they should be prepared

in every case with the evidence of a police officer to identify the charge made upon the charge-sheet with that which has been investigated.

For these reasons I think that the respondent had jurisdiction to hear the case and that the rule should be made absolute.

LUSH J. I agree. I only desire to add that reg. 56 prescribes certain conditions precedent which must be complied with before the magistrate can proceed to hear the case, and it is the duty of the magistrate to satisfy himself that those conditions precedent have in fact been complied with. The competent military authority must be shown to have investigated the case. When the specific case which the magistrate is asked to deal with is before him it must be shown that the competent military authority has determined (reg. 56 (3.)) that the case shall be proceeded with and that the offence is of such a character that it can adequately be dealt with by a Court of summary jurisdiction, and (reg. 56 (5.)) that the authority has determined that the case shall be dealt with by a Court of summary jurisdiction. When once the magistrate is satisfied that those conditions precedent have been complied with he has jurisdiction to deal with the case. Unfortunately in the present case the magistrate took objection to the form of the certificate. He did not say that he was not satisfied that those conditions precedent had been fulfilled.

The regulations do not mention the certificate, and therefore contain no information as to the form it should take, and in my view when the respondent took the objection he was not justified in doing so by reg. 56. If he could show that he was not satisfied that the conditions precedent had been complied with, the case would have borne an entirely different aspect, but in fact the materials before him were such that they could not fail in reason to satisfy him that all those conditions had been complied with, as in fact they had. If he felt any doubt, he only had to ask the question which has been suggested and his doubt would have been cleared up at once. I think he misapprehended —I say that with all respect—the effect and meaning of reg. 56, and that he took the objection to the form of the certificate not being entitled to take it. In my judgment he had jurisdiction

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and declined to exercise it, and the rule must therefore be made absolute.

Rule absolute.

Solicitor for applicant: *Director of Public Prosecutions.*
Solicitor for respondent, the magistrate: *Treasury Solicitor.*
Solicitors for defendant: *Fraser & Christian.*

NOTE.—Reg. 45 (1.) (*a*) of the Defence of the Realm Regulations makes it an offence against the regulations (inter alia) to forge any naval, military, air force, police or official pass, permit, certificate, licence, or other document, or any passport.

Reg. 45 (1.) (*ccc*): "If any person uses or has in his possession without lawful authority or excuse any form which has at any time been prepared by or under the direction of any Government Department or the Government of any of His Majesty's Dominions or any foreign Government for the purpose of being when completed issued as such pass, permit, certificate, licence, or other document, or passport, or has in his possession without lawful authority or excuse any paper or other document so nearly resembling any such form as to be calculated to deceive . . . ." he shall be guilty of an offence against the regulations.

Reg. 56 (1.): "Except as otherwise provided by this regulation, a person alleged to be guilty of an offence against these regulations may be tried either by court-martial, or by a civil Court with a jury, or by a Court of summary jurisdiction." (2.) "Where a person is alleged to be guilty of an offence which is by these regulations declared to be a summary offence he may, if not subject to . . . . military law, be tried by a Court of summary jurisdiction and not otherwise . . . ." (3.) "Where a person is alleged to be guilty of an offence other than an offence declared by these regulations to be a summary offence, the case shall be referred to the competent . . . . military authority who shall forthwith investigate the case and determine whether or not the case is to be proceeded with, and if it is to be proceeded with, whether or not it is an offence of such a character that it can adequately be dealt with by a Court of summary jurisdiction." (4.) "If it is determined that the case is not to be proceeded with, the alleged offender, if in custody, shall (unless he is detained on some other charge) forthwith be released." (5.) "If it is determined that the case is to be proceeded with, but that the offence is of such a character as aforesaid, the offender may, if he is not subject to . . . . military law, be tried by a Court of summary jurisdiction and not otherwise . . . ."

Reg. 58C: "Every document purporting to be an order or other instrument issued by a competent . . . . military authority and to be signed by such an authority shall be received in evidence and be deemed to be such an order or instrument without further proof unless the contrary is shown . . . ."

J. E. A.

[IN THE COURT OF APPEAL.]

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June 2, 28.

BRITISH AND FOREIGN STEAMSHIP COMPANY, LIMITED *v.* THE KING.

Shipping—Steamship requisitioned by Admiralty—Charterparty—Navigation Lights screened by Admiralty Instructions—Collision—Loss of Ship—"Consequences of hostilities or warlike operations"—"Cause arising as a sea risk"—Liability of Admiralty.

In March, 1915, the steamship *St. Oswald* was requisitioned by the Director of Transports and taken into the service of the Admiralty on the terms of a charterparty which provided that "the Admiralty shall not be liable if the vessel be lost . . . . in consequence of . . . . any . . . . cause arising as a sea risk," but the Admiralty took the risk of "all consequences of hostilities or warlike operations." On December 31, 1915, in pursuance of instructions from the Admiralty, the ship was steaming at full speed on a very dark night with her lights obscured, being engaged in the operation of evacuating troops from Gallipoli, when she sighted on her starboard bow a French battleship which was also steaming without lights, but almost immediately disclosed them. The *St. Oswald* ported her helm and disclosed her port light, and the battleship almost simultaneously starboarded her helm. The ships were thus brought on to courses forming intersecting circles, and a collision occurred which caused the *St. Oswald* to sink and become a total loss. It was admitted that neither vessel was to blame:—

Held, that the loss of the ship was a "consequence of warlike operations" within the meaning of the charterparty, and that the Admiralty were liable.

Ionides v. *Universal Marine Insurance Co.* (1863) 14 C. B. (N.S.) 259 distinguished.

Decision of Rowlatt J. [1917] 2 K. B. 769 affirmed.

APPEAL from the decision of Rowlatt J. upon a petition of right tried by him in the Commercial Court. (1)

The facts are fully stated in the report in the Court below, and they also appear from the judgments of the Court of Appeal.

The question was whether a steamship which was requisitioned by the Director of Transports and taken into the service of the Admiralty on the terms of a charterparty in Form T. 99c was lost in consequence of "warlike operations" within the meaning of the charterparty, in which case the Admiralty would be liable for the

(1) [1917] 2 K. B. 769.

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loss, or whether she was lost in " consequence of any cause arising as a sea risk."

Rowlatt J. decided that question in favour of the suppliants, the shipowners, and the Crown appealed.

Sir Gordon Hewart S.-G., Greer K.C. and *Ricketts* for the Crown. The burden of proof is on the suppliants to show that the loss was proximately caused by war perils. On the evidence it is submitted that the collision occurred through an error on the part of those who navigated the French battleship. Under the charterparty loss by collision falls within clause 24, and the Admiralty are not liable. The loss of the ship was not the result of hostilities or warlike operations within clause 25 : *Ionides* v. *Universal Marine Insurance Co.* (1) The sailing with lights obscured was not the proximate cause of the loss, although it may have omitted to diminish the risk of accidents : *Le Quellec et Fils* v. *Thomson.* (2) Loss by collision is an ordinary marine peril, and in order to bring the case within clause 25 some act of hostility must be shown to have been the proximate cause : *France, Fenwick & Co.* v. *North of England Protecting and Indemnity Association.* (3) There was here no warlike operation which can be said to have been the proximate cause of the loss : *Becker, Gray & Co.* v. *London Assurance Corporation.* (4)

Leslie Scott K.C. and *A. T. Miller* for the respondents. The proximate cause of the collision and loss of the ship in this case was the navigation without lights, which was a direct consequence of warlike operations. The immediate peril of collision was brought about by the absence of lights. The navigation without lights was part of the scheme of warlike operations : *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.* (5) The peril had begun to operate when the ship was navigated without lights : *Kacianoff* v. *China Traders Insurance Co.* (6) It is a question of fact in each case, and here there was no other cause of the collision than the navigation without lights, which was a necessary incident of warlike operations. Steaming at full speed without lights under the instruc-

(1) 14 C. B. (N.S.) 259.
(2) (1916) 86 L. J. (K.B.) 712.
(3) [1917] 2 K. B. 522, 525.
(4) [1918] A. C. 101.
(5) [1917] 1 K. B. 873.
(6) [1914] 3 K. B. 1121, 1127.

tions of the Admiralty was a warlike operation. It is said that the absence of lights could not be the effective cause of the collision, but if so, neither could a bad look-out: *Engelhart* v. *Farrant & Co.* (1) The warlike operation of navigating without lights brought the ships into the position of imminent danger from collision, so that the peril was in operation, and even if the ideally best steps to avoid collision were not taken by the navigators neither ship was to blame: *The Bywell Castle.* (2) "Warlike operations" must include measures taken by either side, both offensive and defensive. [They also referred to *H.M.S. Sans Pareil* (3) and Marsden on Collisions at Sea, 6th ed., pp. 3-6.]

Ricketts in reply. Although no negligence is imputed to either ship, an innocent mistake in navigation may have caused the collision, in which case the cause would be one "arising as a sea risk." [*Munro, Brice & Co.* v. *War Risks Association* (4) was also referred to.]

Cur. adv. vult.

June 28. SWINFEN EADY M.R. This is the appeal of the Attorney-General on behalf of the King from the judgment of Rowlatt J. in favour of the suppliants on the trial of a petition of right.

The suppliants were the owners of the steamship *St. Oswald*, which was sunk in the Mediterranean on the night of December 31, 1915, after being in collision with the French battleship *Suffren*, and the question is whether the loss was occasioned by a war risk or a sea risk. The *St. Oswald* was a steel single-screw steamship of 3810 tons gross and 2411 tons net register and about 361 feet long and she was requisitioned by the Admiralty for use on Government service when she was at Marseilles on March 28, 1915. She was so taken up on the terms of a charterparty known as T. 99c, and expressed to be made between the owners and the Director of Transports for and on behalf of the Admiralty. Clauses 21, 24, and 25 of the charterparty are as follows: "(21.) The master shall obey all orders and instructions which he may receive from the Admiralty or from any officer authorised by them and shall in all

(1) [1897] 1 Q. B. 240, 244.
(2) (1879) 4 P. D. 219.
(3) [1900] P. 267.
(4) Ante, p. 78.

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respects comply with the confidential instructions for masters of transports, but he shall be solely responsible (on behalf of the owners) for the management, handling and navigation of the ship." "(24.) The Admiralty shall not be held liable if the vessel shall be lost, wrecked or driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk." "(25.) The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause: Warranted free of capture, seizure and detention and the consequences of hostilities or warlike operations whether before or after declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer." The steamship continued in the service of the Admiralty until she was lost.

On December 31, 1915, she was engaged as a transport in the Eastern Mediterranean assisting in the evacuation of troops from Gallipoli. About 5.30 P.M. she left the harbour at Imbros bound for Helles, Gallipoli. She had no navigation or other lights showing, and was proceeding at full speed (which was between seven and eight knots), pursuant to orders and instructions from officers of the Admiralty. Her side lights were in position and lighted but obscured; her masthead light was lighted but not hoisted or showing. The night was dark, and there was no moon. After rounding Cape Kephalo the vessel was put on a course for Helles, S.E. ½ S. The chief officer shortly afterwards saw the loom of the *Suffren* bearing a little on his starboard bow, and almost immediately afterwards the *Suffren* displayed lights, and he saw her masthead lights and her port light, whereupon he put his helm hard a-port and uncovered his side lights and gave one blast, indicating that he was directing his course to starboard. Almost immediately afterwards he saw that the *Suffren* had starboarded her helm; she gave two blasts; her green light came into view, and she struck and rammed the *St. Oswald* at an angle of about 60 degrees on the port side, causing her to sink almost immediately. The captain of the *St. Oswald* gave evidence that he was in the chartroom, having handed over the vessel to the chief officer, after placing her on a

course for Helles, when he heard the sound of one blast from his own ship, and rushed on the bridge and found the *Suffren* almost ahead; the helm of his own ship was hard a-port, and he ordered that it should be kept at that; his vessel was swinging rapidly, but the *Suffren* came on and with her ram struck the *St. Oswald* on the port side about opposite the foremast, and she sank in about a minute and a half. The *Suffren's* speed was about twelve knots, and the *St. Oswald's* seven or eight knots, so that the combined speeds would be about twenty knots, or a knot in three minutes. The master estimated that when he came on to the bridge the vessels were only about a quarter of a mile apart, probably less, so that it was a matter of some thirty to forty-five seconds before the impact occurred. Between the time when the *Suffren* was first sighted and the collision the interval was very short indeed; the time stated in the evidence differs somewhat from the time stated in the two written reports made by the master shortly after the catastrophe, but in each case it is an estimate only and difficult to judge with any degree of accuracy. The shorter period is probably nearer to the truth. The only evidence is that of the master and chief officer of the *St. Oswald*. No evidence was adduced of those on board the *Suffren*, and we were told that that ship was subsequently lost.

In the answer and plea of the Attorney-General to the petition it was alleged that the loss of the *St. Oswald* was occasioned by the fault and negligence of the master in not keeping or causing to be kept any, or alternatively any proper, look-out, whereby the master did not become aware of the approach of the *Suffren* in sufficient time to avoid the collision. During the opening the Attorney-General abandoned the point that there was a bad look-out on the *St. Oswald*. The Attorney-General also stated that he did not take any point about the variation of the times given, and did not suggest negligence of any kind on the part of either ship. He also stated that he did not dispute that the sailing without lights was a military operation. The attitude taken up by the Attorney-General on the trial was that the suppliants had the burden of proving their case and had not discharged the burden; and the contention of the Solicitor-General before us has been to the same effect. Reliance was placed upon a passage in the second written statement of the

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master that "the collision might have been avoided if both vessels had altered course to starboard from the time of first seeing one another, but was probably largely due to the uncertainty caused by the screening of navigation lights." This statement was considerably modified by the master's evidence at the trial, that after the vessels first sighted each other they drew together so rapidly that there was hardly time to do anything, and that if the *Suffren* had ported her helm the ships were in such close order that it would not have availed to prevent the collision, and that the ships could not see one another in time to avoid the collision; he further said that the collision was solely due to carrying out the Admiralty orders and keeping lights screened.

Upon the facts, I am of opinion that the collision was occasioned solely by the absence of lights and the speed at which the vessels were proceeding. They were unable to see one another in sufficient time to prevent a collision, which was inevitable at the moment when the vessels first perceived each other. The Solicitor-General urged that the absence of lights could not cause a collision, although the presence of lights might prevent one. Having regard to the speed of the vessels, I am of opinion that it was the absence of lights which caused the collision—caused it in this sense, that it prevented the vessels from seeing one another at such a distance apart as would have enabled them to take the ordinary steps dictated by good seamanship and steer a course by which each would have passed clear of the other.

It was urged that by the terms of the charterparty a collision is expressly named as a marine risk, and not as a war risk. This is true. But there is also a warranty "from all consequences of hostilities or warlike operations," and if there is a collision as such a consequence it is covered by the warranty and excluded from being a loss by a sea risk. If a vessel chartered under T. 99c were rammed and sunk by a hostile warship, it cannot be doubted that such a loss, although arising as the result of a collision between the two vessels, would be a loss by warlike operations and covered by the warranty.

The fact that the collision was between two vessels of the Allies does not prevent it from being a consequence of warlike operations. The illustration put by Erle C.J. in *Ionides* v. *Universal Marine*

Insurance Co. (1) of a ship blown up by mines placed to protect a port from hostile aggression was obviously the case of a friendly ship entering the port, but he pointed out that in that case the proximate cause of the loss would clearly be the consequence of hostilities, and so within the exception. In that case it was held that the proximate cause of the loss was not the extinguishment of the light on Cape Hatteras, but the fact of the captain having missed his reckoning, and either not keeping a sufficient look-out or not lying to when his position was doubtful and so running ashore. In *France, Fenwick & Co.* v. *North of England Protecting and Indemnity Association* (2) the proximate cause of the loss was that the ship ran upon a sunken wreck, which is an ordinary marine peril. To embark upon an inquiry as to how the wreck came to be there, and whether it arose from the violence of the seas or as a consequence of warlike operations, would be to investigate not the proximate but a remote cause.

In the present case the dispute is not determined by saying that the *St. Oswald* was lost through a collision, as the further question then arises, What occasioned the collision? And the answer is that it was solely occasioned by obedience to orders to sail without lights and to go at full speed. Such a proceeding was in defiance of the rules of good seamanship, but necessitated by the exigencies of the warlike operations then in progress.

In my opinion the *St. Oswald* was lost by the proximate, direct, and immediate consequence of warlike operations, and accordingly that the appeal fails.

SCRUTTON L.J. On December 31, 1915, the steamship *St. Oswald*, while engaged under requisition by the Admiralty in evacuating the British troops from the Gallipoli Peninsula, was run into and sunk by the French battleship *Suffren*. The *St. Oswald* till just before the collision was by orders of the Admiralty steaming at night without lights and at full speed. The *Suffren* till just before the collision was also steaming without lights. The owners of the *St. Oswald* claimed her value from the Crown under the terms of the charter on which she was requisitioned. The material clauses are 21, 24, and 25. [The Lord Justice read these clauses and

(1) 14 C. B. (N.S.) 259, 286. (2) [1917] 2 K. B. 522.

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continued :] It was clear that the vessel was lost by collision, but the owners alleged that the loss and the collision were directly caused by hostilities or warlike operations, and were a risk of war for which the Admiralty was liable.

We are relieved from considering in this case how far precautions against enemy action are hostilities or warlike operations, for in the Court below, on a question from the judge "You do not dispute of course that sailing without lights is a military operation?" the Attorney-General for the Crown answered "No, my Lord . . . . That is clear. I do not in the least dispute that it was a contributory cause." I deal with the case on this admission and reserve the right to consider in any future case the exact meaning of the term "warlike operations."

The risks taken by the Admiralty under the charter are the risks which would be excluded from an ordinary Lloyd's policy by the clause known as the "f. c. and s." clause. This brings into operation the rule of construction usually expressed in the maxim "Causa proxima non remota spectatur," a phrase which, after many years of service, now finds the accuracy of its language somewhat in question. Lord Sumner in *Becker, Gray & Co.* v. *London Assurance Corporation* (1) prefers the phrase the "direct" instead of the "proximate" cause. Lord Dunedin in *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society* (2) favours the expression "the dominant cause." Lord Shaw uses indifferently the terms "real," "efficient," "predominant." Lord Haldane uses the words "immediate cause." We appear to be back in the regions from which I had thought the rule of proximate cause was intended to save us, where it is necessary to select from a number of contributory causes the principal one which caused the loss. Whatever the language, I understand the plaintiffs do not dispute that it is not enough for them to prove that the loss happened in the course of a military operation, or that a military operation was one of the contributory causes which together produced the loss. The military operation must be the direct or dominant cause of the loss, and no new and independent cause must operate after the military operation alleged. The question then is, Have the plaintiffs proved that the direct or dominant cause of the loss was military operations without the

(1) [1918] A. C. 101, 114. (2) [1918] A. C. 350, 362, 363, 370.

intervention of any new and independent effective cause? There again the question in dispute is much limited by the attitude taken by the Crown at the trial. They did not affirmatively allege any other cause; they did not affirmatively allege or suggest that either ship was negligent. The learned judge says in his judgment: "The Attorney-General declined to affirm (and I asked him specifically as to the *Suffren*) that either vessel did wrong under the circumstances. He merely said it was not affirmatively proved that the collision was the consequence of the warlike operations."

I agree that the plaintiff who proves a state of facts consistent with liability or non-liability of the defendant fails; but the Court cannot fail to be influenced by the fact that the defendant declines to allege any state of facts proving that he is not liable. The question then is, Have the plaintiffs proved that the collision and loss were directly caused by the military operation of steaming full speed at night without lights in order to remove troops without attracting the attention of the enemy guns or submarines?

The Court is in the unsatisfactory position of having to pass judgment in the circumstances of the collision without nautical assessors, and on evidence from one ship only. In my experience it is unusual in a collision case for the evidence of one side accurately to state the whole facts, and it is obviously almost impossible for evidence from one vessel at night accurately to state the course of or the look-out on the other ship. And the position is not made easier when the defendant declines to make any affirmative suggestion as to the circumstances of the collision, but only says that the plaintiff's evidence leaves the matter ambiguous.

Two witnesses were called for the plaintiffs. The mate first saw the *Suffren* two points on his starboard bow; he did nothing till the *Suffren* almost immediately afterwards showed a red light, when he quite properly ported and blew one blast. That is, having an apparently crossing ship on his starboard side, he took steps to keep out of her way by passing red to red. The *St. Oswald's* master, who was in the chartroom below the bridge, came up at once on hearing the blast, and then saw the *Suffren* slightly on his port bow just showing her green light. The collision took place almost directly and the *Suffren* struck the *St. Oswald* on the port bow by the foremast, at an angle of 60 degrees to the centre line leading

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aft. Those on the *St. Oswald* thought her head had altered five or six points. It is obvious, as the *Suffren's* green light came into view, that she was acting under a starboard helm, and the angle of the blow, if the *St. Oswald* is right as to the alteration of her head, shows that the *Suffren* was originally a crossing ship and swung considerably under a starboard helm. It seems further clear that all these events happened in a very short time, probably less than two minutes, and as the boats were approaching at a joint speed of about twenty knots, that they probably saw each other at considerably less than a mile off. If the ships had been carrying the normal lights it would seem on the evidence before us difficult to justify the *Suffren's* action. As a crossing ship, with the other on her port side, she should have kept her course and speed. If by any chance the ships appeared to be meeting, of which there is no evidence, the *Suffren* should have passed port to port. I have no doubt, if we heard the *Suffren's* case, we should hear a very different story. But it is one of the obvious results of steaming at night full speed without lights that ships may come on each other very suddenly, each with no sufficient indications of what the other ship is doing, and even of whether she is a steamship or sailing ship; and I am not disposed to treat an apparently wrong manœuvre in what has been called the agony of the moment, when the "agony" is produced by the order to steam full speed without lights, as a new and independent cause preventing the original order from having its full effect. And this is particularly so when the defendants themselves will not take the burden of alleging that the *Suffren* was negligent.

I have come to the conclusion, therefore, that the appeal should be dismissed. But I desire to say that in my view this case must not be taken as deciding either that every collision where the vessels are steaming without lights is a war risk, or that steaming without lights by Admiralty orders is always a warlike operation.

DUKE L.J. The decision of this case depends upon the true answer to the question whether the loss of the steamship *St. Oswald* was caused by "collision" within the meaning of clause 24 of the charter-party made between the suppliants and the Admiralty, or was caused by "hostilities or warlike operations" within the meaning of clause 25.

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On December 31, 1915, while the Gallipoli Peninsula was being evacuated by His Majesty's forces, the *St. Oswald* was ordered as an auxiliary transport in the service of the Crown to proceed from the island of Imbros to Cape Helles in the peninsula, a distance of about ten miles, as was stated, in order that she might there take troops on board. Various ships were engaged in the undertaking of evacuation. It was a dark night, and under orders issued by the proper naval authority the vessel was navigated at her full speed of seven to eight knots an hour and without lights. While she was so proceeding her chief officer saw ahead of her a little on her starboard bow a vessel which is now known to have been the French battleship *Suffren*. The *Suffren*, like the *St. Oswald*, was being navigated without lights, and her speed is estimated at from twelve to fourteen knots. Almost immediately upon being seen from the *St. Oswald* the *Suffren* showed her lights. Her port side light and her masthead light were seen from the *St. Oswald*. Thereupon the *St. Oswald's* lights were shown, the *St. Oswald's* helm was put hard a-port, and a signal of one blast was given. The *Suffren* starboarded her helm and gave a signal of two blasts. The result of the alteration made in the courses of the two vessels was that the *Suffren* struck the *St. Oswald* on her port side with her ram with such force and weight that the *St. Oswald* sank in about a minute and a half.

By the terms of the charterparty the owners of the *St. Oswald* were to bear risks of loss in consequence of collision, and the risks which would be excluded from an ordinary English policy of marine insurance by the words "warranted free from . . . . all consequences of hostilities or warlike operations" were to be borne by the Admiralty. The owners of the *St. Oswald*, alleging her loss to be within the risk accepted by the Admiralty, claimed by their petition of right to recover her value from the Crown.

Upon the hearing the only evidence given was that of the captain and chief officer of the *St. Oswald*. The *Suffren* had been sunk at sea during the war. No case of negligence on the part of either vessel was set up for the Crown, and it was admitted by the Attorney-General in express terms that the sailing of the *St. Oswald* without lights was a military operation. The view of the facts taken by the learned judge was that when the vessels sighted each other they were

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in instant peril of collision, that neither vessel was to blame, and "that the manœuvres which they executed did not constitute an intervening cause of the collision, but are merely to be regarded as an attempt which failed to escape from the existing peril. Escape or destruction depended upon sudden action which might be fortunate or disastrous, but which had to be taken." The learned judge found, accordingly, that the cause of this loss was the warlike operation of navigating at night at a high speed and without lights, and he gave judgment for the suppliants.

Counsel for the Crown relied, in supporting the appeal, upon the terms of the charterparty which leave with the owners risks of collision, and the rule which is expressed in the maxim "Causa proxima non remota spectatur." They contended that the evidence on the part of the suppliants did not prove the absence of lights to have been the proximate, effective, and immediate cause of the collision, that there was an evident and unexplained mistake on the part of the *Suffren* which was the direct cause of the collision, and that a mistake in the navigation of one of two approaching ships is a peril of the sea and not a risk from warlike operations. The case was likened to that of the *Linwood* in *Ionides* v. *Universal Marine Insurance Co.* (1)

There is no lack of guidance as to the principle upon which the cause of loss in a case like the present is to be ascertained. The discussion covers, at any rate, the period from Lord Bacon's time to the present year. Lord Bacon made it the subject of Title i. in the treatise on the Maxims of the Law, which he dedicated in 1596 to Queen Elizabeth. It has been expounded in *Becker's Case* (2) this year in the House of Lords. "A peril insured against acting upon the subject insured immediately, and not circuitously": per Lord Alvanley in *Hadkinson* v. *Robinson* (3); "the immediate cause": per Abbott C.J. in *Walker* v. *Maitland* (4); "causa causans": per Lord Ellenborough in *Gordon* v. *Rimmington* (5); "the proximate and absolute certain cause" and "the proximate immediate cause": per Willes J. in *Ionides* v. *Universal Marine Insurance Co.* (6); "the direct and immediate cause": per Lord FitzGerald in

(1) 14 C. B. (N.S.) 259.
(2) [1918] A. C. 101.
(3) (1803) 3 Bos. & P. 388, 392.
(4) (1821) 5 B. & Al. 171, 174.
(5) (1807) 1 Camp. 123.
(6) 14 C. B. (N.S.) 289.

Cory & Sons v. *Burr* (1); "the real moving cause": per Lord Esher in *The Xantho* (2); and "the real effective cause": per Lopes L.J. in *Pandorf* v. *Hamilton* (3), are successive expressions of the same idea; and in *Becker, Gray & Co.* v. *London Assurance Corporation* (4) Lord Sumner suggested that the cause to be ascertained is simply "the real and commonsense cause," and proposed to style it "the direct cause." The cause of the loss which is here in question seems to me to be established in a manner which satisfies the requirements of the rule in all its modes of expression. I am satisfied, as Rowlatt J. was satisfied, that the cause of the loss of the *St. Oswald* was the military or warlike operation in which she was engaged when she was sunk. She was purposely navigated at full speed without lights during the night in an area in which other vessels were being similarly navigated. Such a mode of navigation involves special risks of collision, and involves also the risk that in conditions of imminent peril collision will result from movements made by mistake in efforts to avoid collision. A collision which occurred in this way in the course of a military operation brought about the loss of the *St. Oswald*. The risk began in the military operation, and the military operation gave to the risk its conclusive effect. I think, therefore, that the decisive question in the case ought to be answered in favour of the respondents, and that the appeal should be dismissed.

Appeal dismissed.

Solicitor for Crown: *Treasury Solicitor.*
Solicitors for respondents: *Lightbound, Owen & Co.*

(1) (1883) 8 App. Cas. 393, 406.
(2) (1886) 11 P. D. 170, 172.
(3) (1885) 16 Q. B. D. 629.
(4) [1918] A. C. 112.

G. A. S.

1918
Sept. 10.

MORRIS *v.* MARTIN.

Army—Military Service—Obligation to serve—Military Service Act, 1916 (*Session* 2) (6 *& 7 Geo.* 5, *c.* 15), *s.* 1—*Military Service* (*No.* 2) *Act*, 1918 (8 *& 9 Geo.* 5, *c.* 5), *s.* 8, *sub-s.* 3; *Sched. II.*

A man who became liable to military service under s. 1 of the Military Service Act, 1916 (Session 2) (repealed by the Military Service (No. 2) Act, 1918), incurred an "obligation" within the meaning of the proviso to s. 8, sub-s. 3, of the Act of 1918; and as the proviso preserves "any obligation whatsoever incurred by any man" to whom s. 1 of the Act of 1916 applied, the repeal of that section by the Act of 1918 does not release the man from his liability to military service.

CASE stated by justices of the county of Pembroke.

At a Court of summary jurisdiction sitting at Haverfordwest an information was preferred by the appellant, Morris, under the Military Service Act, 1916 (Session 2), against the respondent, Martin, for that he, being a man of the reserve forces, unlawfully, and without leave granted, did fail to present himself when duly called up for military service.

The respondent was a married British subject and liable to military service under the Military Service Act, 1916 (Session 2), unless he was included in the exceptions contained in the First Schedule to the Military Service Act, 1916. On July 23, 1917, he became a regular minister of a religious denomination. On April 4, 1918, he was sent a notice requiring him to report for service on May 6, 1918, with which he did not comply. On the part of the appellant it was contended that the respondent was not a regular minister of a religious denomination at the date he was deemed to have been enlisted and transferred to the reserve under the Military Service Act, 1916 (Session 2), namely, June 24, 1916, and he did not, therefore, come under the exception contained in the First Schedule of the Military Service Act, 1916, and that his ordination on July 23, 1917, did not affect his position. On the part of the respondent it was contended that he did not come under the Military Service Acts, inasmuch as the Military Service Act, 1916, s. 1, sub-s. 1, the Military Service Act, 1916 (Session 2), s. 1, and the First Schedule

to the Military Service Act, 1916, had been repealed by the Military Service (No. 2) Act, 1918, and that as his ordination took place before the Military Service (No. 2) Act, 1918, was passed, he was excepted from liability to service. The justices were of opinion that the respondent, having been ordained prior to the Military Service (No. 2) Act, 1918, coming into force (April 18, 1918), was protected by the exception contained in the First Schedule to that Act. The question upon which the opinion of the Court was desired was whether the justices came to a correct determination in law. (1)

Giveen (*Branson* with him) for the appellant. The respondent did not become a regular minister of a religious denomination till

(1) Military Service Act, 1916 (Session 2) (6 & 7 Geo. 5, c. 15), s. 1, sub-s. 1: "Every male British subject who has at any time since the fourteenth day of August, 1915, been, or for the time being is, ordinarily resident in Great Britain, and who for the time being has attained the age of eighteen years and has not attained the age of forty-one years, shall, unless he either is for the time being within the exceptions set out in the First Schedule to the Military Service Act, 1916 (in this Act referred to as the principal Act), as amended by this Act or any subsequent enactment, or has attained the age of forty-one years before the appointed date, be deemed as from the appointed date to have been duly enlisted in His Majesty's regular forces for general service with the colours or in the reserve for the period of the war, and to have been forthwith transferred to the reserve. . . . . The appointed date shall, as respects men who come within the operation of this section on the passing of the Act" (May 25, 1916), "be the thirtieth day after the date of the passing of this Act. . . . ."

Military Service Act, 1916 (5 & 6 Geo. 5, c. 104), First Schedule —Exceptions: "4. Men in holy orders or regular ministers of any religious denomination."

Military Service (No. 2) Act, 1918 (8 & 9 Geo. 5, c. 5) (passed on April 18, 1918), s. 8, sub-s. 3: "The enactments specified in the Second Schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule: Provided that, without prejudice to the general application of s. 38 of the Interpretation Act, 1889, with regard to the effect of repeals, the repeal of the said enactments shall not affect any obligation whatsoever incurred by any man to whom s. 1 of the Military Service Act, 1916, or s. 1 of the Military Service Act, 1916 (Session 2), applied." First Schedule—Exceptions: "5. Men in holy orders or regular ministers of any religious denomination."

By the Second Schedule to the Act, s. 1, sub-s. 1 of the Military Service Act, 1916, and s. 1 of the Military Service Act, 1916 (Session 2), are (inter alia) repealed.

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July 23, 1917, and the appointed day under the Military Service Act, 1916 (Session 2), was June 24, 1916. On that date the respondent was deemed to have been enlisted and transferred to the reserve. He then acquired a statutory status of which he could not deprive himself by any subsequent voluntary act, such as his ordination: *Stone* v. *Wood*. (1) By the proviso to s. 8, sub-s. 3, of the Military Service (No. 2) Act, 1918, the repeal of s. 1 of the Military Service Act, 1916 (Session 2), does not affect the obligation to serve which the respondent had incurred under the Military Service Act, 1916 (Session 2). The respondent was called up for service on April 4, 1918, before the Military Service (No. 2) Act, 1918, came into force.

Artemus Jones for the respondent. The respondent did not incur any obligation for military service under the Military Service Act, 1916 (Session 2). That statute was repealed by the passing of the Military Service (No. 2) Act, 1918, on April 18, 1918, and the respondent's obligation to serve did not arise till May 6, 1918, the date on which he was required to report himself. At that date he was an ordained minister and was therefore within the exception in clause 5 of the First Schedule to the Military Service (No. 2) Act, 1918. The mere liability to service under the Military Service Act, 1916 (Session 2), did not become an "obligation" till May 6, 1918, the date fixed by the military authorities in the notice. The language of the proviso to s. 8, sub-s. 3, of the Act of 1918 is restricted. It preserves obligations incurred under the repealed sections of the Military Service Acts, 1916, but not mere liabilities. It must be admitted that if the proviso had contained the word "liability" instead of "obligation" the case for the respondent would be unarguable.

DARLING J. I am of opinion that this appeal must succeed. The proviso to s. 8, sub-s. 3, of the Military Service (No. 2) Act, 1918, clearly applies to the respondent unless he did not incur any obligation under s. 1 of the Military Service Act, 1916 (Session 2). But s. 1 of the Military Service Act, 1916 (Session 2), applied to the respondent, and under that section he was deemed to have been enlisted and transferred to the reserve as from the appointed date, i.e., June 24, 1916. It is true that he was not compelled to present

(1) [1917] 2 K. B. 885.

himself and intimate that he was ready to go on active service, but he was under an obligation to serve, being on the appointed date deemed to have been enlisted and transferred to the reserve. On behalf of the respondent it is contended that, although he had incurred a liability to serve, that liability did not amount to an obligation within the meaning of the proviso to s. 8, sub-s. 3, of the Military Service (No. 2) Act, 1918, but it is admitted that if there had been the word "liability" instead of "obligation" in the proviso the respondent's case would have been unarguable. In my judgment the respondent was under the obligation to come up for active service if and when he was called upon to do so. There is a difference between being under an obligation and fulfilling it. I think this view is strengthened by the language of Bankes L.J. in *Freyberger's Case* (1), to which I referred in *Stone* v. *Wood* (2): "It seems to me to be plain from the language of s. 1, sub-s. 1, of the Military Service Act, 1916, that on the appointed date the applicant became subject to the Act, and acquired a certain military status—the status of a person duly enlisted for the period of the war. Having acquired that statutory status, he cannot, in my opinion, by any voluntary act on his part, whether it be a formal declaration of alienage under the Act of 1914, assuming for the moment that he could make it, or any less formal act, divest himself of that status." In my judgment the respondent in the present case acquired the statutory status of a person duly enlisted for the period of the war, and I do not think the Military Service (No. 2) Act, 1918, divested him of that status, or left him for any period at liberty so that he could during that period by becoming a minister of some denomination escape military service.

BRAY J. I am of the same opinion. On behalf of the appellant Mr. Giveen has contended that the respondent has incurred an obligation under s. 1 of the Military Service Act, 1916 (Session 2), which is preserved by the proviso to s. 8, sub-s. 3, of the Military Service (No. 2) Act, 1918. In my judgment that contention must be upheld. It is not denied that the respondent came within s. 1 of the Military Service Act, 1916 (Session 2), but it is contended that the fact of his being duly enlisted and transferred to the reserve did not

(1) [1917] 2 K. B. 129, 140. (2) [1917] 2 K. B. 885.

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impose upon him any obligation until the calling-up notice had been given and expired. In my opinion the obligation arose the moment that the appointed date under the Act of 1916 arrived. The respondent thereupon became a member of the reserve, and liable to be called up on notice. Therefore the time when the calling-up notice was given is immaterial. It happens in the present case that the notice was in fact given before the Act of 1916 was repealed, and if I were wrong in holding that there was an obligation upon him on the appointed date in 1916, I think I should be right in holding that an obligation was incurred at all events on April 4, 1918, when the calling-up notice was given. If a person promises to pay on a future date, the obligation arises, in the ordinary sense of the word, at the date the promise to pay was made, not at the date the obligation has to be fulfilled. So in the present case I think the obligation to serve was incurred by the respondent on the appointed date under the Military Service Act, 1916 (Session 2), and that he therefore is within the proviso to s. 8, sub-s. 3, of the Military Service (No. 2) Act, 1918, which preserves that obligation.

BAILHACHE J. In my judgment the respondent, in the particular circumstances of this case, became enlisted in His Majesty's Forces for the period of the war in 1916 on the date appointed for the coming into operation of the Military Service Act, 1916 (Session 2). I think the respondent on that date became under an obligation to serve whenever called upon so to do, and the time at which the notice was served is immaterial. He was a person who had incurred an obligation preserved by the Act of 1918.

Appeal allowed. Case remitted to magistrate to convict.

Solicitor for appellant: *Treasury Solicitor.*

Solicitors for respondent: *T. D. Jones & Co., for F. E. Greathead, Pembroke.*

J. E. A.

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